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706
702

No. 2054

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation, and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation,

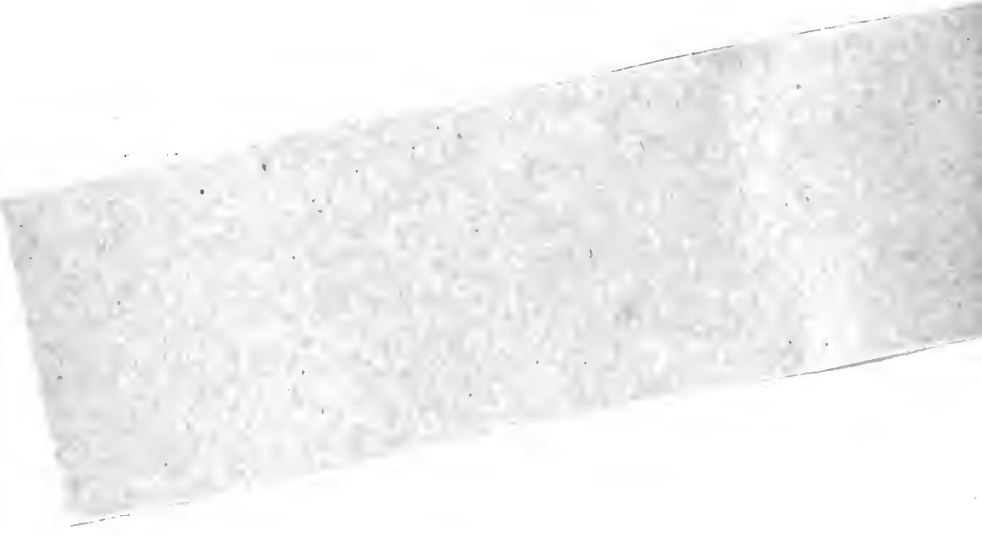
Appellees.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the District of Idaho.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

Records of U. S. Circuit
Court of Appeals
506



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

J. D. SKEEN, Esq., Attorney for Plaintiff,
Salt Lake City, Utah.

Messrs. HANSBROUGH & GAGON, JOHN W. JONES, Esq., Attorneys for Defendants,
Residence, Blackfoot, Idaho.

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the District of Idaho:

Charles A. Hickenlooper, a citizen of the State of Utah, residing at Ogden, in the Northern Division of the said State of Utah, brings this, his bill of complaint, against T. H. Christy, who is now and at all times herein mentioned has been a citizen and resident of the State of Idaho; The Crystal Springs Investment Company, Limited, a corporation, incorporated and existing under and pursuant to the laws of the State of Idaho, and which is now and at all

times herein mentioned has been a citizen and resident of the said State of Idaho; and W. J. D'Arcy, receiver of the Crystal Springs Investment Company, Limited, a corporation, who is now and at all times herein mentioned has been a citizen and resident of the said State of Idaho, defendants; therefore your orator complains and says:

1.

That the defendant, The Crystal Springs Investment Company, Limited, is a corporation organized and existing under and pursuant to the laws of the State of Idaho, with its principal place of business at Blackfoot, Idaho. [1*]

2.

That on the thirteenth day of April, 1909, upon petition of A. G. Roberts et al., the District Court of the Sixth Judicial District of the State of Idaho, for Bingham County, made and entered its order appointing the defendant W. J. D'Arcy receiver of the defendant, The Crystal Springs Investment Company, Limited, and said defendant is still acting in the capacity of receiver of said corporation.

3.

That on and prior to the eighth day of July, 1907, Thomas G. Clegg, was the owner and in possession of the following described real estate located in Bingham County, State of Idaho, to wit:

Lots 1 and 2 of Section 19, in township 4 south of range 33 east of Boise Meridian, containing 61.49 acres;

Also the north half of the northeast quarter of Sec-

*Page-number appearing at foot of page of original certified Record.

tion 24, in township 4 south, of range 32 east, Boise Meridian, containing 80 acres;

Also the southeast quarter of the northeast quarter of Section 24, in township 4 south, of range 32 east of Boise Meridian;

And also the north half of the southwest quarter of Section nineteen, in township 4 south of range 33 east of Boise Meridian, containing 150.85 acres.

4.

That on the said eighth day of July, 1907, for a valuable consideration, the said Thomas G. Clegg and his wife, Rachel A. Clegg, made, executed and delivered to one S. J. Rich, at Blackfoot, Idaho, their certain negotiable promissory note, whereby they undertook and agreed to pay the said S. J. Rich on the eighth day of December, 1910, the sum of Fourteen Hundred Dollars ($1400.00), with interest thereon at the rate of eight per cent per annum, and on said day the said Thomas G. Clegg and Rachel A. Clegg, to secure payment of said note, made, executed, and delivered to the said S. J. [2] Rich a mortgage upon the premises hereinabove described; a copy of which note and mortgage is hereto attached, marked Exhibits "A" and "B," and made a part of this bill.

5.

That thereafter and before the twenty-fifth day of September, 1908, the said Thomas G. Clegg and wife sold and conveyed the real estate described in paragraph number three hereof to the defendant, The Crystal Springs Investment Company, Limited.

6.

That on the twenty-fifth day of September, 1908,

for a valuable consideration, the defendant, The Crystal Springs Investment Company, Limited, made, executed and delivered to Thomas G. Clegg its certain negotiable promissory note whereby it undertook and agreed to pay the said Thomas G. Clegg the sum of Two Thousand Eighty Dollars ($2,080.00) on or before the first day of May, 1909, with interest thereon at the rate of eight per cent per annum, and to secure payment of said note the said The Crystal Springs Investment Company, Limited, made, executed and delivered to the said Thomas G. Clegg a certain mortgage upon the real estate described in paragraph three hereof, which said mortgage was subject to the mortgage hereinbefore referred to as Exhibit "B"; that a copy of the mortgage last above described is hereto attached, made a part of this bill and marked Exhibit "C."

7.

That on the twenty-sixth day of October, 1908, the said Thomas G. Clegg sold, assigned and transferred the said mortgage marked Exhibit "C" to the Brown-Hart Company, Limited, a corporation, of the State of Idaho, and thereafter on the twenty-third day of February, 1909, the said Thomas G. Clegg sold and assigned all his existing rights in and to the said note and mortgage to the defendant, T. H. Christy, and on the twentieth day of April, 1910, the said Brown-Hart Company, Limited, sold, assigned and transferred all its right, title and interest in and to said mortgage to the said T. H. Christy and the said T. H. Christy now claims to be the [3] legal owner and holder of said note and mortgage.

8.

That the said Thomas G. Clegg and the said The Crystal Springs Investment Company, Limited, and their successors in interest failed and neglected to make payment of the principal and interest due on said note and mortgage attached hereto as Exhibits "A" and "B," and during the year 1908 suit was instituted in the District Court of the Sixth Judicial District of the State of Idaho for Bingham County to recover judgment on said note and to foreclose the mortgage attached to this bill as Exhibit "B," and such proceedings were thereafter had that a judgment was regularly made and given in said action against the said The Crystal Springs Investment Company, Limited, for the sum of Eighteen Hundred Eleven Dollars and Sixty Cents ($1811.60), said mortgage marked Exhibit "B" was foreclosed and an order of sale of all of the real estate described in paragraph three of this bill was duly and regularly made commanding the sheriff of Bingham County, State of Idaho, to sell said real estate pursuant to the law and the practice of said court. Said real estate was duly sold pursuant to said proceedings, the said S. J. Rich became the purchaser thereof, and a certificate of sale was regularly issued by the said sheriff to the said S. J. Rich on June 30, 1908, entitling him to a deed of conveyance of all of said real estate one year after said date.

9.

That the said The Crystal Springs Investment Company, Limited, became insolvent and the defendant W. J. D'Arcy was duly appointed receiver as

above set forth; that neither the said W. J. D'Arcy, as such receiver, nor the The Crystal Springs Investment Company, Limited, had money or the means of procuring money with which to redeem the said real estate from the sale to the said S. J. Rich, and on the twenty-eighth day of June, 1909, said receiver filed a petition in the said district court for Bingham County, Idaho, praying for an order authorizing and directing him as such receiver to borrow the sum of Twenty-five Hundred Dollars ($2500.00) to [4] redeem said real estate from said sale and to secure payment of the said loan by mortgage upon the said real estate so redeemed and to pay interest thereon at the rate of twelve per cent per annum; and thereafter on the ninth day of July, 1909, the said District Court made and entered its order authorizing and directing said receiver to borrow the said sum of Twenty-five Hundred Dollars ($2500.00) to redeem said property as aforesaid; that copies of said petition and order are hereto attached, made a part of this bill and marked Exhibits "D" and "E."

10.

Your orator further says that he was solicited by the said receive*d* and by the defendant, T. H. Christy, his predecessors in interest, and the stockholders and subsequent lien claimants of the real estate described in paragraph number three, to advance the said sum of Twenty-five Hundred Dollars ($2500.00) with which to redeem said real estate from said sale to S. J. Rich, and the said receiver contracted and agreed with him that the repayment of the said money so loaned would be secured by a first mort-

gage upon said real estate and the said defendant, T. H. Christy, and his predecessors in interest, agreed with your orator that his loan should be prior to all other liens; that pursuant to said agreement with the said receiver and with the defendant, T. H. Christy, and his predecessors in interest, believing that the Court would make the order set out as Exhibit "E," and to save said property for the benefit of all interested therein, on the thirtieth day of June, 1909, your orator advanced Two Thousand Twelve Dollars and Seventy-six Cents ($2012.76) to the said receiver, which said money was actually used by him in paying the judgment of the said S. J. Rich and redeeming the property described in paragraph three from said lien, judgment and foreclosure.

11.

That said receiver failed to make, execute and deliver to your orator a mortgage upon the said real estate set out in paragraph three; that on the first day of July, 1910, your orator demanded payment of said receiver of the sum of Two Thousand Twelve Dollars and Seventy-six Cents ($2012.76), with interest thereon at the rate of twelve per cent per annum from the thirtieth day of June, 1909, to the thirtieth day of June, 1910, together with a reasonable attorney's fee; that said receiver duly allowed said claim, except as to attorney's fees, but refused payment for the reason that he had no funds or assets with which to make payment of said claim. [5]

12.

That thereafter on said second day of July, 1910,

upon motion the District Court for the county of Bingham, State of Idaho, granted your orator leave to institute suit against the said receiver in any court of competent jurisdiction to establish a lien upon the real estate described in paragraph three and to have said lien declared a first lien upon said property and to secure such other and further relief as the Court should adjudge him to be entitled to.

13.

Your orator further alleges that the said T. H. Christy has repudiated his agreement and the agreement of his predecessors in interest that your orator should have a first and prior lien upon said premises in consideration of his loaning the said sum of Two Thousand Twelve Dollars and Seventy-six Cents ($2012.76) to the defendant, W. J. D'Arcy, as receiver, and has instituted a suit in the District Court for Bingham County, State of Idaho, to have the said second mortgage declared a first and prior lien upon said premises; that neither the said receiver nor the said defendant, The Crystal Springs Investment Company, Limited, has money or other assets with which to satisfy either of said mortgages, and said real estate is not sufficient to pay your orator a substantial portion of his claim after the satisfaction of the said mortgage marked Exhibit "C."

To the end, therefore, that your orator may have the relief which he can only obtain in a court of equity and that the defendants, and each of them, may answer the premises, but not upon oath, or affirmation, an answer under oath and affirmation being hereby expressly waived by your orator as to each

of said defendants, he now prays the Court:

1.

For judgment against the The Crystal Springs Investment Company, Limited, and W. J. D'Arcy, the receiver thereof, for the sum of Two Thousand Twelve Dollars and Seventy-six *Cent* ($2012.76), with interest thereon at the rate of twelve per cent per annum from [6] the thirtieth day of June, 1909, together with a reasonable attorney's fee.

2.

That your orator be subrogated to the rights of the said S. J. Rich under the note and mortgage attached hereto as Exhibits "A" and "B"; that said mortgage be revived, reinstated and foreclosed according to law and the practice of this court and out of the proceeds of the sale of the said real estate that the costs and expenses of this proceeding, including a reasonable attorney's fee, be paid; that the judgment be paid in full, if sufficient be realized from the sale of said property, and after the payment thereof that the residue, if any, be paid to the junior lien claimants.

3.

That all other liens or claims upon or against said real estate or the proceeds therefrom be declared subsequent to the lien of your orator and permitted to participate in the proceeds from the sale of said property only after the payment of all costs and expenses of this proceeding, and such judgment as the Court may enter.

4.

If, in the opinion of the Court, your orator is not

entitled to a foreclosure and sale of said property, then your orator prays that he be subrogated to all of the rights formerly held by the said S. J. Rich, under the mortgage set forth as Exhibit "B"; that said mortgage be revived, reinstated and declared a first lien upon the real estate specifically described in paragraph number three.

5.

Your orator prays for such further and other relief in the premises as the nature of the circumstances of the case *as* may require. [7]

May it please your Honors to grant to your orator a writ of subpoena*e* to be directed to the defendant, T. H. Christy, to W. J. D'Arcy, receiver of the The Crystal Springs Investment Company, Limited, a corporation, and to the said The Crystal Springs Investment Company, Limited, and each of them, commanding them, and each of them, at a time set and under penalty therein to be specified, to personally appear before this Honorable Court and then and there full, true, direct and perfect answer make to all and singular the premises, and to state, perform and abide by such order, direction and decree as may be made against them, and each of them, in the premises, as shall seem meet and agreeable to equity, and your orator will ever pray.

J. D. SKEEN,
Solicitor for Complainant. [8]

United States of America,
State of Utah,
County of Weber,—ss.

Charles A. Hickenlooper, being first duly sworn,

on his oath says that he is the person named as the complainant in the foregoing bill of complaint; that he has read said bill, knows the contents thereof and that the same is true of his own knowledge, except as to those things therein stated on information and belief, and as to those matters he believes it to be true.

CHARLES A. HICKENLOOPER,
Affiant.

Subscribed and sworn to before me this 5th day of July, 1910.

[Seal] D. A. SKEEN,
Notary Public for Weber County, Utah. [9]

Exhibit "A" [to Complaint].

PROMISSORY NOTE SECURED BY REAL ESTATE MORTGAGE.

$1400.00 Blackfoot, Idaho, July 8, 1907.

On December 8th, 1910, after date, without grace, for value received, we or either of us promise to pay S. J. Rich, or order, at the Blackfoot State Bank in Blackfoot, Idaho, the sum of Fourteen Hundred Dollars, lawful money of the United States, with interest thereon at the rate of eight (8) per centum per annum from date payable semi-annually.

In case default shall be made in the payment of the interest as above specified, then it shall be optional with the holder of this note to consider the principal sum due and payable immediately and the same shall be payable on demand. Makers and endorsers hereof do each severally agree to the above provision and do also waive demand, notice, protest and notice of protest and nonpayment, guarantee-

ing to pay all costs of collection including a reasonable attorney's fee, in case this note is collected by an attorney, and consent that time of payment may be extended without notice thereof.

Due January 4, 1910.

(Signed) THOMAS G. CLEGG.
RACHEL A. CLEGG. **[10]**

Exhibit "B" [to Complaint].

ESTATE MORTGAGE.

THIS INDENTURE, made the 8th day of June in the year nineteen hundred and seven between Thomas G. Clegg and Rachel A. Clegg, husband and wife of the county of Bingham and State of Idaho, the parties of the first part, and S. J. Rich of the County of Bingham and the State of Idaho, the party of the second part.

WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Fourteen Hundred and no/100 ($1400.00) Dollars, do by these presents grant, bargain, sell and convey unto said party of the second part and to his heirs and assigns forever all that certain real property situated in the county of Bingham and state of Idaho, and bounded and particularly described as follows, to wit:

Lots One (1) and Two (2) of Section Nineteen (19) in Township Four (4) South of Range Thirty-three (33) East of Boise Meridian, containing Sixty-one and 49/100 (61.49) acres; also the north half of the Northeast Quarter (N. ½ NE. ¼) of section Twenty-four (24) in Township Four (4) South, of Range thirty-two (32) East Boise Meridian, con-

taining eighty (80) acres. Also the south-east quarter of the Northeast quarter, (SE. ¼ NE. ¼), of Section Twenty-four (24) in Township Four (4) South, of Range Thirty-two (32) East of Boise Meridian. Also the north half of the South-west quarter (N. ½ SW. ¼) of section Nineteen (19) in Township Four (4) South of Range Thirty-three (33) East of the Boise Meridian containing one hundred and fifty and 85/100 (150.85) acres. This mortgage is given to secure a part of the purchase price of all of the above described tracts of land, with the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

This grant is intended as a mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said first parties to the said party of the second part for the said sum of $1400.00, bearing interest at the rate of [11] 8 per centum per annum, interest payable semi-anually; principal falling due December 8th, 1910; principal and interest payable at the Blackfoot State Bank, Blackfoot, Idaho.

AND THESE PRESENTS shall be void if such payment be made. But in case default shall be made in the payment of the said principal sum of money, or any part thereof as provided in the said note, or if the interest be not paid as therein specified, then it shall be optional with the said part— of the second part, his executors, administrators or assigns, to consider the whole of said principal sum expressed in said note, as immediately due and payable, and immediately to enter into and upon all and singular

the above described premises, and to sell and dispose of the same according to law, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure suit, including reasonable counsel fees, and also the amounts of all such payments of taxes, assessments, incumbrances or insurance as may have been made by said second party, his heirs or executors, with the interest on the same, rendering the overplus of the purchase money, if any, to the parties of the first part, their heirs, executors, administrators or assigns.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) THOMAS G. CLEGG. [Seal]
RACHEL A. CLEGG. [Seal]
_____ [Seal]

Signed sealed and delivered in the presence of
J. O. STONE. [12]

Exhibit "C" [to Complaint].

REAL ESTATE MORTGAGE.

THIS INDENTURE, made the 25th day of September, in the year of our Lord one thousand nine hundred and eight, between the Crystal Springs Investment Company, Limited, a corporation, of the County of Bingham, and State of Idaho, the party of the first part, and Thomas G. Clegg, of the County of Bingham, State of Idaho, the party of the second part,

WITNESSETH. That the said party of the first part, for and in consideration of the sum of Two Thousand and Eighty Dollars, lawful money of the United States of America, and under and by virtue of a certain resolution of the Board of Directors of the said first party herein heretofore duly called and held at the principal place of business of said corporation, to wit. Blackfoot, Idaho, at which said meeting the President and Secretary of said first party were authorized and empowered to execute this mortgage upon the real estate of the said first party, and to deliver the same to the said second party, upon the said second party's payment of the amount herein specified, upon a former mortgage of said property heretofore executed to the Salisbury Company, a corporation which said payment has been made by the said party of the second part, and reference is hereby had to said resolution of authorization and the same is by such reference made a part hereof, does by these presents grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns, forever, all that certain real property situate in the County of Bingham and State of Idaho, and bounded and particularly described as follows, to wit:

The North half of the Southwest quarter, the Northwest quarter of the Southeast quarter and the Southwest quarter of the Northeast quarter of section Twenty-four (24), and the Southeast quarter of the Southwest quarter of said Section Twenty-four (24) and the Northeast quarter of the Northwest quarter and the Northwest quarter of the Northeast

quarter of Section Twenty-five (25), the Southwest quarter of the Southwest quarter of said section twenty-four (24), and the Northwest quarter of the Northwest quarter of said section Twenty-five (25), and the Southwest quarter of the Northwest quarter of said section Twenty-four (24) all in Township four (4) south of Range thirty-two (32) east of the Boise Meridian in Idaho, and also Lots one (1), two (2) and three (3) of section nineteen (19), in Township four (4), South of Range Thirty-three (33) east of the Boise Meridian, in Idaho, and the North half of the Northeast quarter, the Southeast quarter of the Northeast quarter of the Northeast quarter of the Southeast quarter of section twenty-four (24), in Township four (4) South, of Range thirty-two (32) East of the Boise Meridian, in Idaho, containing 680 acres more or less.

Together with all ditches, ditch rights of way and water rights thereto appertaining and belonging.

Together with all the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

This grant is intended as a mortgage to secure the payment of one certain promissory note of even date herewith, executed and delivered by the said first parties to the said party of the second part, for the said sum of $2,080.00 due on or before May 1, 1909, **[13]** and bearing interest from date, at the rate of 8% per annum, interest payable at maturity, payable at Blackfoot, Idaho.

And these presents shall be void, if such payment be made, but in case default shall be made in the pay-

ment of the said principal, sum of money or any part thereof as provided in said note, or if the interest be not paid as therein specified, then it shall be optional with the said party of the second part, his executors, administrators or assigns, to consider the whole of said principal sum expressed in said note as immediately due and payable and immediately to enter into and upon all and singular the above-described premises and sell and dispose of the same according to law and out of the money arising from such sale to retain the principal and interest which shall then be due on the said promissory note, together with the costs and charges of foreclosure suit, including a reasonable sum as counsel fees, and also the amounts of all such payments of taxes, assessments, incumbrances, or insurance as may have been made by the said second party, his heirs, or executors, with interest on the same, rendering the overplus of the purchase money, if any there shall be, unto the said party of the first part, its successors or assigns.

IN WITNESS WHEREOF the said first party has caused these presents to be signed and executed by its President and Secretary and its corporate seal to be hereunto affixed, this day and year first above written.

THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED.

By THOMAS G. CLEGG,
Its President.

[Seal] Attest: A. G. ROBERT,
Its Acting Secretary.

State of Idaho,
County of Bingham,—ss.

I DO HEREBY CERTIFY: That on this 25th day of September in the year of 1908, before me, John W. Jones, a Notary Public in and for said County and State, personally appeared Thomas G. Clegg and A. G. Robert, personally known to me to be, respectively the President and Acting Secretary of the Crystal Springs Investment Company, Limited, the corporation that executed the within and foregoing instrument, and they each acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal at Blackfoot, Idaho, the day and year first above written.

[Seal] JOHN W. JONES.

My commission expires July 10, 1909.

[Endorsed]: 22,962—Crystal Springs Investment Co., to T. G. Clegg, Mortgage State of Idaho, County of Bingham,—ss. I hereby Certify That the Within Instrument was Filed for Record in This Office at the Request of Thomas G. Clegg on the 24th day of October, 1908, at 3 P. M. and was Duly Recorded in Book "Y" of Mortgages, page 139, Bingham County Records.

H. B. CURTIS,
County Recorder.
S. D. Hillard,
Deputy. [14]

Exhibit "D" [to Complaint].

In the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bingham.

A. G. ROBERT, WILLIAM KRAACK, W. A. EDWARDS, J. A. MARTIN, L. C. ROCKWOOD, and A. B. ROBERT,

Plaintiffs,

vs.

CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), THOMAS G. CLEGG, O. R. DIBBLEE, W. H. GIBSON, W. C. NOBLE, W. W. PRIESTLEY, C. R. MURCHISON and W. A. HICKENLOOPER,

Defendants.

Petition.

The petition of W. J. D'Arcy, heretofore duly appointed by the proper order of the Judge of the above-entitled court, as receiver for the said defendant corporation, Crystal Springs Investment Company, Limited, respectfully shows to the Court:

That your receiver was heretofore, on the 13th day of April, 1909, duly appointed as the receiver for the defendant corporation above named, and forthwith took the oath of office as such and gave the undertaking conditioned as required by law in the penal sum of $5,000.00, as required by the order of said Court, and thereupon, your petitioner entered upon the discharge of his duties as such receiver, and is now en-

gaged in the discharge of the duties of his said trust.

That your petitioner has ascertained that the said defendant corporation is the owner and possessed of a certain tract of land situate in the county of Bingham, State of Idaho, and described as follows, to wit: The Lots one and two of Section nineteen, in township four south, of range thirty-three E., B. M.; also the north half of the northeast quarter of Section twenty-four, in township four south, of range thirty-three east, Boise Meridian, in Idaho; also the southeast quarter of the northeast quarter and [15] the northeast quarter of the southeast quarter of Section twenty-four, in township four south, of range thirty-two E., B. M.; also the south half of the southwest quarter of Section nineteen, in township four south, of range thirty-three east, B. M., which said described property was conveyed to the said defendant corporation by Thomas G. Clegg and wife, said conveyance being subject to a certain mortgage thereon, executed in favor of one S. J. Rich; that said mortgage became due and the same was not paid, and during the year 1908, suit was instituted in the above-entitled District Court for the foreclosure of said mortgage of said property and judgment in foreclosure was entered in said action, and on June 2, 1908, execution in foreclosure issued out of said District Court directed to the Sheriff of Bingham County, Idaho, directing him to sell so much of said property as was necessary in the satisfaction of said judgment, and on June 30, 1908, all of said described property was sold to said S. J. Rich, he having bid therefor the sum of $1,811.60.

That your petitioner is informed and believes that the said property so sold is worth an amount greatly in excess of the said sum of $1,811.60, and is worth about the sum of $5,000.00, and that it is necessary for your petitioner, in order to protect the interest of the said defendant corporation, to secure a sum necessary for the redemption of said property from said sale, for the said defendant corporation, and that said sum must be secured for such redemption before the period of redemption expires, to wit, June 30, 1909.

That your petitioner is informed and believes that he can borrow a sufficient sum with which to redeem said described property if he can secure from this Court an order so to do and an order authorizing and directing him to execute a mortgage on said described property, after redemption, for the amount necessary to redeem, with interest at the rate of 12 per cent per annum thereon.

Your petitioner further represents that he is, as such receiver, wholly without funds with which to redeem said property [16] and that unless the order above referred to be made herein, said described property will be lost to the defendant corporation and its assets greatly decreased thereby, in from $2,000 to $3,000.

WHEREFORE, your petitioner prays for an order of this Court authorizing and directing him as such receiver for the defendant corporation to borrow such a sum of money as may be necessary to redeem said property, not to exceed $2,500.00, forthwith, and that your petitioner as such receiver be authorized and directed by an order of this Court, as

security for said loan, to execute to such person loaning said sum, as security therefor, a mortgage upon the property herein described, and to be so redeemed, for the sum so borrowed, with interest thereon at the rate of 12 per cent per annum.

Dated at Blackfoot, Idaho, June 28, 1909.

W. J. D'ARCY,
Petitioner.

State of Idaho,
County of Bingham,—ss.

W. J. D'Arcy, being first duly sworn, deposes and says: That he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true, except as to those matters which are therein stated to be on information and belief, and as to those matters, he believes it to be true.

W. J. D'ARCY.

Subscribed and sworn to before *to before* me this 28th day of June, 1909.

[Seal] JOHN W. JONES,
Notary Public. **[17]**

Exhibit "E" [to Complaint].

(Title of Court and Cause.)

Order.

On reading and filing the petition of W. J. D'Arcy, receiver of the defendant corporation above named, praying for an order of this Court authorizing and directing said petitioner, as the receiver of said corporation, to borrow such a sum of money as may be necessary for the purpose of redeeming certain

property sold on execution in foreclosure, belonging to said defendant corporation and for an order authorizing and directing him as such receiver to execute a mortgage to the person making such loan, in the amount thereof, as security therefor, upon the property in said petition described, and to be so redeemed, with interest at 12 per cent per annum thereon, said sum not to exceed $2,500.00 and it appearing from said petition that certain lands belonging to said defendant corporation were sold under mortgage foreclosure execution, on the 30th day of June, 1908, for the sum of $1,811.60 which said sum does not exceed one-half of the value of said property, and that the period for redemption expires on June 30th, 1909, and that the said receiver has no funds in his possession with which to redeem said property from said sale, and that said receiver can borrow the requisite sum necessary therefor, provided he be authorized and directed so to do, and by an order of this Court empowered to execute a mortgage on said property to be so redeemed, for the amount necessary to redeem, with interest at the rate of 12 per cent per annum thereon, and that such action on the part of the receiver would inure greatly to the benefit of said defendant corporation.

IT IS THEREFORE ORDERED, that the said receiver of the said defendant corporation, W. J. D'Arcy be and he is hereby authorized and directed to borrow such a sum as may be necessary to redeem the property in his said petition and hereinafter described [18] from sale on execution in foreclosure, on the 30th day of June, 1908, and that with said sum

said property be redeemed for *an* in the name of the said defendant corporation, said property being described as Lots 1 and 2 of Section 19, in T. 4 S., of R. 33 E., B. M., in Idaho; also the N. ½ of the NE. ¼, of Section 24, T. 4 S. of R. 32 E., B. M., also the SE. ¼ of the NE. ¼ and NE. ¼ of SE. ¼ of Section 24, in T. 4 S. of R. 32 E., B. M.; also the N. ½ of SW. ¼ of Section 19, in T. 4 S. of R. 33 E., B. M., in Idaho.

That said sum to be so borrowed must not exceed the sum of $2,500.00, and it is further ordered that the said receiver be and he is hereby authorized and directed, as security for the sum so borrowed to execute a mortgage upon the said property herein described, in said amount, bearing interest at the rate of 12 per cent per annum, and to deliver the same to the person from whom said sum is borrowed, who is to be the mortgagee therein.

Dated at Blackfoot, Idaho, July 9th, 1909.

J. M. STEVENS,
Judge of Said Court.

[Endorsed]: Filed July 8, 1910. A. L. Richardson, Clerk. [19]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Affidavit of Charles A. Hickenlooper [on Application for Order Appointing J. T. Danilson to Serve Subpoenas].

State of Utah,
County of Weber,—ss.

Charles A. Hickenlooper, being duly sworn, upon his oath says that he is plaintiff in the above-entitled suit; that the defendants T. H. Christy and W. J. D'Arcy are residents of Blackfoot, in Bingham County, State of Idaho; that the principal place of business of the Crystal Springs Investment Company, Limited, is Blackfoot, Bingham County, Idaho, and the officers of said corporation upon whom service of process should be made reside in said city and county; that affiant is informed by the United States Marshal for the State of Idaho that there is no Deputy United States Marshal residing near Blackfoot, Idaho, and that the estimated expense of making service of the process herein is Forty-six Dollars and Sixty-eight Cents ($46.68); that John T. Danilson is the sheriff for Bingham County, Idaho, and is a fit

and proper person to make service of process.

WHEREFORE affiant makes application and prays for an order of the Court appointing, designating and authorizing the said John T. Danilson, or some other fit and proper person residing at Blackfoot to serve the subpoenaes in this proceeding.

C. A. HICKENLOOPER. [20]

Subscribed and sworn to before me this 13th day of July, 1910.

[Seal] W. R. SKEEN,
Notary Public.

My commission expires July 18, 1913.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk. [21]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Order [Appointing J. T. Danilson to Serve Subpoenas].

It appearing to the Court that the defendants in the above-entitled suit are residing at Blackfoot, in the State of Idaho, and that there is no United States

Marshal or Deputy United States Marshal located at or within a reasonable distance from Blackfoot,—

NOW, THEREFORE, on motion of J. D. Skeen, solicitor for the said plaintiff, it is ordered that John T. Danilson be and he is hereby appointed, authorized and directed to make service of the subpoenaes in the above-entitled suit upon each of the defendants therein and make affidavit of such service in the manner prescribed by law.

Dated this 15th day of July, 1910.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 15, 1910. A. L. Richardson, Clerk. [22]

In the Circuit Court of the United States for the Southern Division of the District of Idaho.

IN EQUITY—No. 139.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Subpoena ad Respondendum.

The President of the United States of America, to T. H. Christy, The Crystal Springs Investment

Company, Limited, a Corporation, and W. J. D'Arcy, Receiver of the Said The Crystal Springs Investment Company, Limited, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the United States, at the Courtroom thereof, in Pocatello, in said District, on the first Monday of September next, which will be the 5th day of September, A. D. 1910, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said court, wherein Charles A. Hickenlooper is complainant and you are defendants, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to COMMAND you, the MARSHAL of said District, or your DEPUTY, to make due service of this our WRIT of SUBPOENA and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of our said Circuit Court affixed at Boise, in said District, this 8th day of July, in the year of our Lord, One Thousand Nine Hundred and Ten and of the Independence of the United States the One Hundred and 35th.

[Seal] A. L. RICHARDSON,
Clerk.

MEMORANDUM PURSUANT TO EQUITY RULE NO. 12 OF THE SUPREME COURT OF THE UNITED STATES.

The defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken *pro confesso.*

[Endorsed]: No. 139. In the Circuit Court of the United States for the Southern Division of the District of Idaho. In Equity. Chas. A. Hickenlooper vs. T. H. Christy et al. Subpoena ad Respondendum. Returned and filed Oct. 4, 1910. A. L. Richardson, Clerk. [23]

[Affidavit of J. T. Danilson Re Service of Subpoena.]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL S*RP*INGS INVESTMENT COMPANY, LIMITED,

Defendants.

John T. Danilson, being duly sworn, deposes and says: That he is, and at all times mentioned herein, was, over the age of twenty-one years, and not a party to the within action; that he received the

within annexed subpoenae on the 18th day of July, 1910, and personally served the same upon T. H. Christy on the 23d day of July, 1910, and upon W. J. D'Arcy, Receiver of the Crystal Springs Investment Company, Limited, on the 22d day of July, 1910, at Blackfoot, Bingham County, Idaho.

Dated this 3d day of Sept., 1910.

JOHN T. DANILSON.

Subscribed and sworn to before me this 3d day of September, 1910.

[Seal] T. A. JOHNSTON,
Probate Judge. [24]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Appearance [of T. H. Christy].

Comes now the defendant, T. H. Christy, by his attorneys, Hansbrough & Gagon, of Blackfoot, Idaho, and appears in the above-entitled cause, and hereby orders and directs the clerk of the above Court, to

enter the appearance of the said defendant, T. H. Christy in said cause.

To Hon. A. L. Richardson, Clerk of the above-entitled court, Boise, Idaho.

HANSBROUGH & GAGON,
Attorney for Defendant, T. H. Christy,
Residence, Blackfoot, Idaho.

[Endorsed]: Filed Sept. 2, 1910. A. L. Richardson, Clerk. [25]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Appearance [of W. J. D'Arcy, Receiver].

To the Clerk of said Court:

Now comes the defendant, W. J. D'Arcy, Receiver of The Crystal Springs Investment Company, Limited, a corporation, by his attorney, John W. Jones, and hereby enters his appearance in said action:

Please anter my appearance as attorney for the

said defendant in the above-entitled cause.

Dated September 2, 1910.

JOHN W. JONES,
Attorney for said Defendant.
Residence, Blackfoot, Idaho.

[Endorsed]: Filed Sept. 4, 1910. A. L. Richardson, Clerk. [26]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Answer [of T. H. Christy].

The answer of T. H. Christy, one of the above-named defendants, to the bill of complaint of the above-named plaintiff:

In answer to the said bill, I, T. H. Christy, say as follows:

1.

Admit that the Crystal Springs Investment Company, Limited, is a corporation organized and existing under the laws of the State of Idaho, with its principal place of business at Blackfoot, Idaho.

2.

Admit that on the 13th day of April, 1909, upon petition of A. G. Robert et al., the District Court of the Sixth *Judicial of* Idaho, in and for Bingham, County, made and entered its order appointing W. J. D'Arcy, receiver of the Crystal Springs Investment Company, Limited, as alleged in paragraph two of the bill of complaint herein.

3.

Admit the ownership of the land described in the bill of complaint herein, by Thomas G. Clegg, on and prior to July 8th, 1907, as alleged in paragraph three of the bill of complaint herein; and admit the execution and delivery of the note and mortgage by Thomas G. Clegg and Rachel Clegg, his wife, to S. J. Rich, as alleged in pararaph four of the bill of complaint herein, and admit the ececution [27] and delivery of the note and mortgage by Thomas G. Clegg and Rachel Clegg, his wife, to A. J. Rich as alleged in paragraph four of the bill of complaint herein, and admit the sale and transfer of the land described in paragraph three of the bill of complaint herein, to the Crystal Springs Investment Company, Limited, as alleged in paragraph five of the bill of complaint herein; and admit the execution and delivery of the note and mortgage by the Crystal Springs Investment Company, Limited, to Thomas G. Clegg as alleged in paragraph six of the bill of complaint herein; and admit the sale and transfer of the mortgage marked Exhibit "C" to the Brown Hart Company, Limited, a corporation, and to T. H. Christy by Thomas G. Clegg, and also the sale

and transfer of said mortgage by the Brown Hart Company, Limited to T. H. Christy, as alleged in paragraph seven of the bill of complaint herein; and admit the failure to pay and foreclosure and sale of the property, and purchase of the same by S. J. Rich as alleged in paragraph eight of the bill of complaint herein; and admit the insolvency of the Crystal Springs Investment Company, Limited, and the appointment of W. J. D'Arcy, and the order of the Court to borrow money to redeem said property as alleged in paragraph nine of the bill of complaint herein.

4.

Deny that I ever solicited the said complainant to loan or advance to said receiver, or to anyone else, the sum of $2500.00, or any other sum, with which to redeem the property described in paragraph three of the bill of complaint herein, or otherwise described, or to redeem any other property from the sale to S. J. Rich or to anyone else, as alleged in the bill of complaint herein, or otherwise or at all; and according to my information I deny that my predecessors in interest ever, or at any time, solicited the said complainant to loan or advanced to said receiver, or to anyone else the sum of $2500.00, or any other sum, with which to redeem the property described in paragraph three of the bill of complaint herein; or otherwise described, or to redeem any other property [28] from the sale to S. J. Rich, or to anyone else, as alleged in the bill of complaint herein, or otherwise or at all; and I deny that I ever or at all agreed with the complainant herein, or with

anyone else, or agreed at all, that the loan of complainant be prior to all other liens, as alleged in the bill of complaint, or otherwise or at all, and deny that I ever contracted or agreed with complainant or with anyone for him, or at all, to anything, in relation to said or any advance or loan, as alleged in the bill of complaint or at all; and according to my information and belief, I deny that my predecessors in interest, or anyone for them, ever or at all, agreed with the complainant, or with anyone else for him, or agreed at all, that said or any loan of complainant should be prior to all other liens, as alleged in the bill of complaint, or otherwise, or at all; and according to my information and belief I deny that the said receiver contracted and agreed with the said complainant, or with anyone else for him, or at all, that the repayment of the said or any money so loaned or loaned at all, would be secured by a first mortgage upon said or any real estate as alleged in the bill of complaint, or otherwise or at all; and I deny that pursuant to said or any such agreement with the said receiver and with myself and my predecessors in interest, as alleged in the bill of complaint or at all, on the Thirteenth day of June, or at all, the complainant advanced $2,012.76 to the said receiver for said purpose; I admit that the said complainant advanced said sum to the said receiver for the purpose of redeeming said property from said sale to S. J. Rich, but allege that he did so by an arrangement wholly between said complainant and said receiver.

5.

Deny that I have repudiated my agreement or any

agreement and the agreement or any agreement of my predecessors in interest as alleged in the bill of complaint, or otherwise or at all, I deny that I ever made any agreement with complainant or with anyone for him, as alleged in the bill of complaint, or otherwise or at all, and deny that I ever repudiated any agreement as alleged in the [29] bill of complaint, or otherwise or at all; and deny that in consideration of complainant's loaning the said receiver the said sum of $2,012.76, that he is entitled to or should have first lien on said property, as alleged in the bill of complaint, or at all.

6.

Your *orthor* further says, that he purchased said note in good faith and for value, that he never at any time had any contract or agreement in relation to the same with the Crystal Springs Investment Company, Limited, or with W. J. D'Arcy, said receiver, nor with the complainant herein in relation thereto, that the Crystal *S½rings* Investment Company, Limited, made and executed said mortgage marked Exhibit "C" and set out in the bill of complaint herein which was afterwards transferred to me, said Christy, that after default in the payment thereof the same was foreclosed by action in the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, and the property described therein sold, that it was the duty of the said Crystal Springs Investment Company, to redeem said property from the sale of said S. J. Rich, as aforesaid, and also to pay off the mortgage set out in the bill of complaint marked Exhibit "C," that said com-

plainant should not be subrogated to the rights of said S. J. Rich, and that the note and mortgage marked Exhibits "A" and "B" should not be revived, reinstated and foreclosed against this defendant as prayed for in the bill of complaint, and that the claim of the said complainant against the said Crystal Springs Investment Company should not be declared a first lien on said property described in paragraph three of the bill of complaint, but that said bill should be dismissed with costs, as to this defendant, and your orator says that the bill of complaint should be dismissed at complainants costs, as to this defendant.

T. H. CHRISTY.

HANSBROUGH & GAGON,
Solicitors for T. H. Christy.
Residence, Blackfoot, Idaho. [30]

State of Idaho,
County of Bingham,—ss.

T. H. Christy, being duly sworn, deposes and says: I am the above-named defendant; so much of the foregoing answer as concerns my own acts and deed is true to the best of my own knowledge; and so much thereof as concerns the acts or deed of any other person or persons, I believe to be true.

T. H. CHRISTY.

Subscribed and sworn to before me this 19th day of September, 1910.

[Seal] GEO. F. GAGON,
Notary Public.

[Endorsed]: Filed Sept. 21, 1910. A. L. Richardson, Clerk. [31]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Answer [of W. J. D'Arcy, Receiver].

The answer of W. J. D'Arcy, receiver of The Crystal Springs Investment Company, Limited, a corporation, one of the defendants in the bill of complaint of Charles A. Hickenlooper, complainant.

This defendant now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

Admits that the defendant, The Crystal Springs Investment Company, Limited, is a corporation organized and existing under and purusant to the laws of the State of Idaho, with its principal place of business at Blackfoot, Idaho.

Admits that on the 13th day of April, 1909, upon

petition of A. G. Robert et al., the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, made and entered its order appointing this answering defendant receiver of said The Crystal Springs Investment Company, Limited, and that this answering defendant is still acting in the capacity of receiver of said corporation. [32]

Admits that on and prior to the 8th day of July, 1907, Thomas G. Clegg was the owner and in the possession of the real estate situated in Bingham County, State of Idaho, as particularly described in paragraph 3 of complainant's bill of complaint.

Admits that on the said 8th day of July, 1907, said Thomas G. Clegg and his wife, Rachel A. Clegg, made, executed and delivered to one S. J. Rich, at Blackfoot, Idaho, their certain negotiable promissory note to the purport and effect as set forth in paragraph 4 of said bill of complaint and executed and delivered to the said S. J. Rich, to secure payment thereof, a mortgage upon the premises described in said bill of complaint, as alleged in said paragraph 4 thereof.

Admits that thereafter, and before the 25th day of September, 1908, the said Thomas G. Clegg and wife sold and conveyed the real estate as described in said bill of complaint, to the defendant, The Crystal Springs Investment Company, Limited.

Admits that on the 25th day of September, 1908, said defendant, The Crystal Springs Investment Company, Limited, made, executed and delivered to said Thomas G. Clegg its certain promissory note and mortgage, as set forth and alleged in paragraph

6 of said bill of complaint, and admits the assignment thereof, by the said Thomas G. Clegg, as in paragraph 7 of said bill of complaint alleged.

Admits that the said Thomas G. Clegg and the said The Crystal Springs Investment Company, Limited, and their successors in interest failed and neglected to make payment of the principal and interest due on the said note and mortgage executed by the said Clegg to the said Rich and the institution of foreclosure proceedings and the sale of said real estate, pursuant to law, as alleged in paragraph 8 of said bill of complaint and that on June 30, 1908, said S. J. Rich became the purchaser of said real estate, sold pursuant to said proceedings, and certificate of sale was regularly issued by the sheriff of Bingham County, Idaho, to said S. J. Rich, on said date, entitling him to a deed of conveyance of all of said [33] real estate one year after said date, as alleged in paragraph 8 of complainant's bill of complaint.

Admits each and every of the allegations contained in paragraph 9 of complainant's bill of complaint.

Denied that this answering defendant, as receiver as aforesaid, or in any capacity, as alleged in said bill of complaint or at all, solicited the said complainant to advance the said sum of $2,500.00 or any other sum or amount whatever, with which to redeem the property described in paragraph 3 of said bill of complaint, or to redeem any other property from the sale to S. J. Rich or anyone else, as alleged in said bill of complaint, or at all, and denied that this answering defendant as receiver, or in any capacity or at all, con-

tracted and agreed or contracted or agreed as alleged or at all, with said complainant, or anyone for him, or at all, that the repayment of said money so loaned would be secured by a first mortgage upon said real estate, or secured in any manner other than by the execution of a mortgage on said described premises, bearing interest at the rate of twelve per cent per annum as provided in the order referred to in said bill of complaint and attached thereto and made a part thereof, as Exhibit "E," and alleges that said complainant proffered to advance to the said receiver such sum of money as might be necessary to redeem said real estate from said sale to said S. J. Rich and to take a mortgage on said premises for the amount so advanced as provided in the order attached to said bill of complaint heretofore referred to, marked Exhibit "E," and thereupon, this answering defendant filed the petition and secured the order referred to in said bill of complaint and made a part thereof, as Exhibits "D" and "E," and this defendant did not them, or at any time or at all, contract or agree with complainant that the repayment of said money would be secured by a first mortgage upon said real estate or otherwise than as herein alleged.

Admits that on the 30th day of June, 1909, said complainant advanced $2,012.76 to this answering defendant, as receiver, but **[34]** alleges that the same was advanced pursuant to the said proffer as aforesaid, and not otherwise, and admits that said sum of money was actually used by said receiver in paying the judgment of the said S. J. Rich and redeeming the property described in paragraph 3 of

said bill of complaint, from said lien, judgment and foreclosure.

Admits the allegations contained in paragraph II of said bill of complaint, but alleges that said answering defendant has been at all times and is now ready and willing to make, execute and deliver a mortgage upon the real estate, as described in paragraph 3 of said bill of complaint, pursuant to the order of Court as made on the said 9th day of July, 1909, and said complainant has been at all times so advised.

And this defendant denied all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause, or things in the said plaintiff's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and su*ffu*ciently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

W. J. D'ARCY,

Receiver of the Said The Crystal Springs Investment Company, Limited.

JOHN W. JONES,

Solicitor for Said Defendant.

Residence, Blackfoot, Idaho. [53]

State of Idaho,
County of Bingham,—ss.

W. J. D'Arcy, being first duly sworn, makes solemn oath and says: I am the above-named defendant. So much of the foregoing answer as concerns my own acts and deeds is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

W. J. D'ARCY.

Sworn to before me this 30th day of September, 1910.

[Seal] GEO. F. GAGON,
Notary Public for Bingham County, Idaho.

[Endorsed]: Filed Oct. 3, 1910. A. L. Richardson, Clerk. [36]

Stipulation for Appointment of Daniel Hamer, as Special Examiner.

HANSBROUGH & GAGON, G. F. Hansbrough,
Attorneys-at-Law, Geo. F. Gagon.
Blackfoot, Idaho.

Blackfoot, Idaho, October 3, 1910.

Geo. E. Gray, Esq.,
Attorney at Law,
Pocatello, Idaho.

Dear Sir:

We have just consulted with Mr. J. W. Jones, the other counsel in the receivership case of Hickenlooper vs. Christy and it is entirely satisfactory that the hearing may be had before Daniel Hamer, at

Blackfoot, about the 15th day of December next. If this is agreeable to you and the Court you may have an order made to this effect.

Yours very truly,
HANSBROUGH & GANON.

GFG–EEL.

[Endorsed]: Filed Oct. 4, 1910. A. L. Richardson, Clerk, [37]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Replication [to Answer of T. H. Christy].

The replication of the above-named plaintiff to the answer of the above-named defendant, T. H. Christy.

This repliant, saving and reserving unto himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication, thereunto sa*y*eth that he does and will ever maintain and prove his said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer

of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and humbly as in and by his said bill he has already prayed.

J. D. SKEEN,
Solicitor for Plaintiff.

[Endorsed]: Filed October 20, 1910. A. L. Richardson, Clerk. [38]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Replication [to Answer of W. J. D'Arcy, Receiver].

The replication of the above-named plaintiff to the answer of the above-named defendant, W. J. D'Arcy,

Receiver of the Crystal Springs Investment Company, Limited.

This repliant, saving and reserving unto himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, for replication thereunto sa*yeth* that he does and will ever maintain and prove his said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly as in and by his said bill he has already prayed.

J. D. SKEEN,
Solicitor for Plaintiff.

[Endorsed]: Filed October 20, 1910. A. L. Richardson, Clerk. [39]

Acknowledgment of Service of Replications.]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. J. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Service of the replication in the above-entitled cause is acknowledged this 19th day of October, 1910.

HANSBROUGH & GAGON,
Solicitors for Defendant, T. H. Christy.

[Endorsed]: Filed Oct. 27, 1910. A. L. Richardson, Clerk. [40]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. J. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Service of the replication in the above-entitled cause is acknowledged this 26th day of October, 1910.

JOHN W. JONES,

Solicitor for Defendant, W. J. D'Arcy, Receiver of the Crystal Springs Investment Company, Limited.

[Endorsed]: Filed Oct. 29, 1910. A. L. Richardson, Clerk. [41]

In the Circuit Court of the United States for the District of Idaho.

CHARLES A. HICKENLOOPER,

Plaintiff,

vs.

T. H. CHRISTY et al.,

Defendants.

Stipulation [to Transfer Suit to Boise Division].

It is stipulated by and between counsel for the respective parties in the above-entitled suit, that said suit may be transferred to the Boise Division of the above court, and be set and finally disposed of at the convenience of the Judge of said court.

Dated April 25, 1911.

J. D. SKEEN,

Counsel for Complainant.

HANSBROUGH & GAGON,

Counsel for Defendant, *E.* H. Christy.

JOHN W. JONES,

Counsel for Defendant, W. J. D'Arcy, Receiver, and The Crystal Springs Investment Company.

[Endorsed]: Filed April 30, 1911. A. L. Richardson, Clerk. [42]

In the Circuit Court of the United States for the District of Idaho.

CHARLES HICKENLOOPER,

Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Memorandum Opinion.

DIETRICH, District Judge. (Orally)

Gentlemen: In view of certain features of the record, which are practically undisputed, I have concluded that it is unnecessary to take under advisement the questions of law which have been so elaborately argued. The plaintiff by his bill represents that he advanced the money for which he here seeks security in accordance with an understanding with the receiver of The Crystal Springs Investment Company that the money so advanced should be regarded as a loan and was to be secured by a first mortgage upon the real estate described in the bill. In the pleading reference is made to a petition which was presented to the Court in which the receiver was acting, authorizing him to borrow a sufficient amount of money to redeem from the foreclosure sale referred

to, and to an order which was made by the Court in response to such petition, a copy of the petition and the order being attached as exhibits to the bill. It is to be inferred from the allegations of the bill itself that the plaintiff, when he made the advancement to the receiver, expected to be secured in accordance with and by virtue of the authority conferred by the order, by which, however, it is to be noted, the [43] receiver is not expressly authorized to give a first mortgage, but is only authorized to give a mortgage. Whatever view may be taken of the evidence upon certain other points, it is clear I think that neither the defendant Christy nor his assignor ever agreed with the plaintiff that if he advanced the requisite amount to the receiver the plaintiff should have a lien superior to that of the second mortgage. Assuming that such proposition was made by the plaintiff, the evidence would not support a finding that it was accepted or agreed to. The most favorable view of the record that can be taken upon this point is that the proposition was not expressly rejected. My view of the facts is that the plaintiff, being a stockholder and interested in the welfare of the defendant corporation, was anxious to have the second mortgagee protect the title against the sheriff's deed which was about to be issued under the foreclosure sale based upon the prior mortgage; that he was unable to get any satisfactory promise from the parties interested in the second mortgage, and decided himself to protect the title by advancing the money, hoping that those interested in the second mortgage would be willing to postpone their lien, but expecting and replying

only upon the mortgage which the receiver was authorized to give under the order of the Court referred to. In other words, having an interest to protect and believing that the value of the mortgaged property was sufficient to cover both the first and second mortgages, the plaintiff was willing to extinguish the rights of the purchaser at the foreclosure sale, with the understanding that the money advanced by him for that purpose should be secured by a mortgage given by the receiver pursuant to the authority conferred upon him by the order of the Court. This theory is not out of harmony with the allegations of the bill and is, in my judgment, supported by the preponderance of the evidence. [44]

The plaintiff alleges that the receiver did not execute the mortgage, but it is not seriously controverted that the receiver was willing to execute the mortgage and has never declined so to do, and if he had declined the Court in which he is acting would, on being advised of the fact, doubtless have compelled its receiver to perform his obligations and keep his agreements in that respect and execute the mortgage. But it does not appear that any demand was ever made for the mortgage. Upon the other hand, the receiver positively testifies that at all times he was willing, and is still willing, to execute the mortgage. The plaintiff is here contending, however, not that his expectations be realized and that the agreements entered into be kept by the defendants but that he be given a lien which he did not contract for and did not expect to receive. Under the doctrine of equitable assignment or subregation he seeks to be put in

the place of the mortgagee of the original prior mortgage. It appearing that the complainant contracted for a certain lien and advanced the money in question with the expectation of receiving such lien, namely, the receiver's mortgage, and such mortgages always having been available to him, there is no room for the application of the doctrine of subrogation. It may be true that if the plaintiff had entered into no agreement at all with the receiver or any of the parties interested and, as a stockholder, had advanced to the receiver a sufficient amount to redeem the property, with the expectation of being subrogated, he would be invested with all of the rights of the purchaser at the foreclosure sale. That point, however, it is unnecessary to decide. The money was not advanced under such conditions. As already stated, it was advanced under a certain agreement with the receiver and with certain expectations on the part of the plaintiff, neither of which involved or contemplated a subrogation of the plaintiff to the rights of the purchaser at the sale. [45]

It is true that in one sense the equities are with the plaintiff. If originally he had been put in the place of the purchaser, upon the payment by him of the necessary amount to redeem from the sale, the second mortgagee would in no wise have been prejudiced, and would have no substantial ground for complaint, but upon the other hand it is also true that the plaintiff, being a stockholder in the defendant corporation, and presumably a substantial, if not the largest, stockholder, was equitably under some obligation to see that the debts of the corpora-

tion were paid. Perhaps there was no legal liability, but even so, as a stockholder he had shared in the benefit which the corporation received as a consideration for the indebtedness secured by the second mortgage. Unfortunately the record does not disclose the extent of the plaintiff's interest in the corporation, and it may be that he, indirectly, as a stockholder, received the larger part of the consideration represented by the second mortgage. However that may be, his position in equity is not precisely the same as that of one who, having received no benefit at all, discharges the obligations of another. Moreover, it is not clear that the plaintiff's prayer could be granted without prejudice to rights growing out of the second mortgage. It seems that some time subsequent to the advancement made by the plaintiff the holders of the second mortgage instituted proceedings for the foreclosure thereof, and the decree of foreclosure was entered and the property sold pursuant thereto. Doubtless certain expenses have been incurred, and it may well be that by reason of the foreclosure and sale of the property the subrogation of the plaintiff to the right of the prior mortgagee would give rise to complications highly prejudicial to innocent parties.

For the reasons stated, the bill must be dismissed, and it is so ordered.

[Endorsed]: Filed July 8, 1911. A. L. Richardson, Clerk. [46]

In the Circuit Court of the United States for the District of Idaho, Eastern Division.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Decree.

This cause came on regularly to be heard at this term of the court on the eighth day of July, Nineteen Hundred and Eleven, and was argued by counsel; and submitted to the Court and thereupon upon consideration thereof, it is ordered, adjudged and decreed as follows: That the bill herein be and the same is hereby dismissed.

And that the defendants recover their costs herein incurred taxed at $56.80.

Dated this eighth day of July, 1911.

FRANK S. DIETRICH,
U. S. Dist. Judge.

[Endorsed]: Filed July 8, 1911. A. L. Richardson, Clerk. [47]

In the Circuit Court of the United States for the District of Idaho, Southern Division.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

In pursuance of an order heretofore made and entered by the Court in the above-entitled cause, appointing Daniel Hamar Special Examiner to take the testimony in said cause, and report the same to the Court, and by agreement of counsel for the respective parties, the witnesses appeared before said Special Examiner on the 11th day of March, 1911, at three o'clock P. M. at the office of Messrs. Hansbrough & Gagon, at Blackfoot, Idaho, J. D. Skeen, Esq., appearing as counsel for the complainant and Messrs. Hansbrough & Gagon and John W. Jones, Esq., appearing for the defendants; whereupon the following proceedings were had:

Stipulation [that Testimony be Taken Before Special Examiner].

It is hereby *a*tipulated and agreed by and between the respective parties, through their attorneys of record, that the testimony in this cause shall be taken at this time in shorthand, by Daniel Hamar, the Special Examiner heretofore [48] appointed by

the Court, at the office of Hansbrough & Gagon, in Blackfoot, Idaho, pursuant to the order of the Court and by agreement of all the parties, and that the same shall be transcribed into typewriting, and certified by said Special Examiner, and that when so transcribed and certified the same shall be considered the testimony in this cause, without the signature of the witnesses to their said testimony.

[Testimony of Charles A. Hickenlooper, the Complainant.]

CHARLES A. HICKENLOOPER, a witness called in behalf of the complainant, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. SKEEN.)

Q. You may state your name and residence.

A. C. A. Hickenlooper; I reside at Pleasant View, Weber County, Utah.

Q. Charles A.? A. Charles A., yes, sir.

Q. Did you know the Crystal Springs Investment Company, a corporation, incorporated under the laws of the State of Idaho? A. Yes, sir.

Q. What, if any, connection did you have with that corporation?

A. I held, or my son and I together held, 12,000 shares of stock in the Clegg-Hickenlooper Ranch Company, that they were going to exchange; 12,000 shares of that stock to us as collateral on some notes we held. [49]

Q. That is, The Crystal Springs Investment Company was going to transfer 12,000 shares of its

(Testimony of Charles A. Hickenlooper.)

stock for other stock that you had?

A. Yes; that some of the shareholders in that had put up as collateral on notes that we held.

Q. What, if anything, had been done toward making the transfer?

A. Well, Mr. Clegg, who was the Business Manager of the Crystal Springs, wrote me that the 12,000 shares was set aside and they were ready to exchange any time we turned over the Clegg-Hickenlooper Ranch stock.

Q. Well, what property did the Clegg-Hickenlooper Ranch Company have? What were the assets of the corporation?

A. They had the same ranch property, which was afterwards reincorporated. After we sold our interest it was reincorporated under the name of the Crystal Springs Investment Company.

Q. So that the assets of the two corporations were the same? A. Yes, sir.

Q. And was the property referred to, the property described in paragraph No. 3 of the complainant's bill?

A. Yes, sir, I suppose it is—if it is that bill that I read in your office.

Q. So I understand then, that the two corporations (the Clegg-Hickenlooper Ranch Company and the Crystal Springs Investment Company) held the same assets? A. Yes, sir.

Q. And the Crystal Springs Investment Company was really, in effect, a reincorporation of the Clegg-Hickenlooper Ranch Company?

(Testimony of Charles A. Hickenlooper.)

A. Yes, sir. [50]

Q. Is that the interest that you held on or about the 30th day of June, 1909? A. Yes, sir.

Q. What other, if any, interest did you have in the affairs of The Crystal Springs Investment Company?

A. Well, I was interested in the—oh, what was the name of that company?

Q. The Interstate—

A. The Interstate Realty Company; I was interested in that, to the extent of about 6,000 shares, and had turned my interest in that over to my son, as manager of that interest to look after.

Q. What connection was there between the Interstate Realty Company and the Crystal Springs Investment Company?

A. The Interstate Realty Company held some stock in The Crystal Springs Investment Company, and I was a stockholder in that.

Q. Did you know of the mortgage—

Mr. HANSBROUGH.—Just a moment, now. I am going to object to that last question and move to strike the answer out. I object to the question relative to the Interstate Realty Company—is that it?

WITNESS.—Yes, sir.

Mr. HANSBROUGH.— —and move all of that evidence be stricken out, as incompetent, irrelevant and immaterial.

Mr. SKEEN.—Q. Did you know of the mortgage from Thomas G. Clegg and wife to S. J. Rich, for the sum of $1400.00, covering a part of the property owned by the Crystal Springs Investment Company?

(Testimony of Charles A. Hickenlooper.)

A. Yes, sir.

Q. And did you know of the proceedings being instituted for the foreclosure of that mortgage? [51]

A. Yes, sir.

Q. And did you know of the certificate of sale, and the date of the maturity of the certificate, entitling the holder to a sheriff's deed to the property? A. Yes, sir.

Q. I will ask you if you also knew of a mortgage from The Crystal Springs Investment Company to Thomas G. Clegg, for the sum of $2,080.00?

A. Yes, sir.

Q. Did you know the defendant T. H. Christy on or about the 28th day of June, 1909? A. Yes, sir.

Q. And Mr. Hart, of the Brown-Hart Company?

A. Yes, sir.

Q. I will ask you whether or not you had a conversation with Mr. Christy on or about the 28th day of June, 1909? A. Yes, sir.

Q. You may relate the conversation.

A. I think, though, that it was the 29th or 30th when I had the conversation with him.

Q. The 29th? A. Either the 29th or 30th.

Q. You may relate the conversation and the circumstances leading up to it.

Mr. HANSBROUGH.—We will object to that; that is, at this time. You are referring to what Mr. Skeen?

Mr. SKEEN.—Well, I will add that, if you insist. Some attorneys object if it is added.

Q. In reference to the redemption of the certifi-

(Testimony of Charles A. Hickenlooper.)

cate issued by the Sheriff in the foreclosure of the mortgage of S. J. Rich?

A. Are you ready for the question?

Q. Yes, you may answer that. [52]

A. Well, you just want the conversation that I had with Mr. Christy?

Q. With Mr. Christy first, with reference to the redemption of the Rich mortgage.

A. The receiver (Mr. D'Arcy) and I went around to Mr. Christy, to see if he was going to protect their interest in that property or not.

Mr. HANSBROUGH.—He is asking for the conversation Mr. Hickenlooper. It wouldn't make any difference what you did. We object to that, and move to strike it out.

Mr. SKEEN.—That may go out. Just relate the conversation with Mr. Christy.

A. I asked Mr. Christy if he was going to take care of that property, or whether he was going to let it go by default, and he said he was going to let it go; that he had other collateral for his security, and wasn't sufficiently interested to take care of it. I then asked him if I would take care of it if he would allow my mortgage to take first place, and his remain just as it was then, and he said he thought that could be arranged, providing the Brown-Hart people that were interested in the deal were willing, and he advised me to see them in regard to it. That was about the sum and substance of our conversation. We talked quite a while, but that was about the sum and substance of it.

(Testimony of Charles A. Hickenlooper.)

Q. *The* what did you do after that conversation?

A. We then went around to the Brown-Hart store, and met Mr. Brown I believe it was. I hadn't met him before or since, but I think it was Mr. Brown, if I remember right—one of the interested parties.

Q. One of the members of the Brown-Hart Company?

A. Yes, and had a similar conversation with him, and told him what Mr. Christy had said in regard to the matter, and asked him if they would be willing to the same, and he said— [53]

Q. Willing—now then, just complete that—willing to what?

A. Willing, providing I redeemed this property, that my mortgage should take the first place, or stand just where it did, and their mortgage keep the same place as it was at the time; and he said he thought that that could be arranged, but that there were others interested in it, but if Mr. Christy was willing he thought it could be arranged; something to that effect.

Q. What did you do after that conversation?

A. I took the next train for Ogden to raise the money.

Q. Now, what was the date of the conversation?

A. Let me see—there would be 31 days in that month, wasn't there?

Q. Thirty days in the month.

A. Thirty days? Well, that would be on the 29th, then, because I took the midnight train back to Ogden and arranged for the money with the Pingree Na-

(Testimony of Charles A. Hickenlooper.)

tional Bank and had it phoned to this bank over here —I don't remember the name of the bank.

Q. The Blackfoot State Bank?

A. The Blackfoot State Bank, I think it is.

Q. Who was the cashier of that bank?

A. I think it was a man by the name of Jones, I believe that was the man,—

Q. D. R. Jones?

A. —that Pingree had the conversation with over the phone. I heard the conversation.

Q. Now, what was the time of the conversation, with respect to the date of the maturity of the certificate of sale of the land covered by the Rich mortgage? A. We just had fifteen minutes' time—

Q. No, the first—the conversation between you and Mr. Christy, and you and Mr. Brown, of the Brown-Hart Company? [54]

A. It was the day before the redemption expired —the time of redemption expired.

Q. And you may continue, and relate what you did after returning to Ogden.

A. I returned to Ogden and arranged with Mr. James Pingree, of the Pingree National Bank, for the money, and had him phone it to Mr. Jones, of the bank here.

Q. Did you hear the conversation over the telephone? A. Yes, sir.

Q. You may relate it.

Mr. HANSBROUGH.—Just a moment, now. That would be incompetent, and we object to it as incompetent, because he doesn't know. He hasn't

(Testimony of Charles A. Hickenlooper.)

shown that it was Jones he talked to. We object to that as incompetent for any purpose; that is, the conversation over the phone.

Mr. SKEEN.—You may go ahead and relate it.

A. Mr. Pingree phoned the amount of money—

Q. Well, just state what he said.

A. He told him to turn over that amount of money—

Q. Well, now, the amount?

A. I think it was $2,050.00, if I remember correctly. There was another amount that came in after that, that has confused me just a little. I believe that that was the amount. And he told him to tuen over that money when he received a first mortgage on that property.

Q. I will ask you whether or not you had a conversation with the receiver, Mr. W. J. D'Arcy, on the 29th day of June, 1909? A. Yes, sir.

Q. Respecting the certificate of redemption of the Rich mortgage? [55]

A. Yes, sir, coming to Blackfoot, I went direct to his office.

Q. You may relate it.

A. And he asked me if I could take care of that mortgage, and I told him I thought I could, providing I could be protected; and he said that unless we could get Mr. Christy and the Brown-Hart people to consent to it, that as soon as a new mortgage was made, that the second mortgage that they held now (the blanket mortgage) would take first place; and I told him that under those conditions I wouldn't

(Testimony of Charles A. Hickenlooper.)

be interested in it at all; I wouldn't take any such chances as that; and he said, "Well, we had better go around and have a talk with them," and that is what led up to us going to Mr. Christy and Mr. Brown.

Cross-examination.

(By Mr. HANSBROUGH.)

Q. Did Mr. Christy, at the time you say you went over there to Mr. Brown, tell you that you might have a first mortgage on that?

A. He said he thought that that could be arranged, providing that the Brown-Hart people were willing, and he said, "You had better go around and see those people."

Q. Now, did you ever see him after that about this? A. No, sir.

Q. You never saw him?

A. I never saw him afterwards.

Q. You then went to Brown-Hart? A. Yes, sir.

Q. And that is the only conversation you had ever had with Christy? A. Yes.

Q. Now, you spoke, you say, to Mr. Brown?

A. Yes, sir. [56]

Q. And it wasn't Mr. Hart here? (Indicating Mr. Charles L. Hart.)

A. No, sir, I don't think so. I never saw the man.

Q. Describe Mr. Brown.

A. Well, the man is vacant in my mind. I haven't seen him but the once, and it is nearly two years since. I just was introduced to him, but I didn't

(Testimony of Charles A. Hickenlooper.)

recognize this gentleman as being the one, although I didn't remember which one of the two it was.

Q. Where did you meet him?

A. At the store.

Q. Which store? A. At the Brown-Hart store.

Q. That is the store over here? (Indicating.)

A. Down in the center of the block, as I remember it. That is the only time I was ever in the store.

Q. And you say now that he told you practically the same that you have testified that Christy told you? A. Yes.

Q. That it might be arranged?

A. Yes, that he thought it could be arranged.

Q. Well, did you ever have any further talk with Mr. Brown about that? A. No, sir.

Q. Well, then, you made no arrangement with them? You didn't complete that arrangement, did you?

A. Well, you see, the time was so limited that I had to get right back to Ogden, because the next day the redemption expired.

Q. That is true; but you made no such arrangement, did you, with either Brown or Christy? [57]

A. Well, not any further than that.

Q. You never had any talk with Mr. Brown afterwards?

A. I had a man here that was looking after my interest to do that.

Q. Afterwards?

A. Yes, sir; I left a man here in the town.

Q. Well, you were not here? A. No.

(Testimony of Charles A. Hickenlooper.)

Q. And you don't know what your man did if anything? A. He is here to testify.

Q. Oh, your man is here? A. Yes, sir.

Q. But so far as you are concerned personally, you never made any further arrangement?

A. No, sir.

Q. With either Brown, of the Brown-Hart Company, or with Mr. Christy? A. No, sir.

Q. Or anyone else in that bank? A. No, sir.

Q. Or anyone else in that store? A. No, sir.

Q. Did you consider, at the time that you advanced that money, that you had completed an arrangement with the Brown-Hart people and Christy?

A. I thought that it would go through along the lines that we had talked. I certainly did, or I wouldn't have turned the money over.

Q. But you didn't think, and you knew at that time that you hadn't completed any arrangement, didn't you?

A. Well, not right definite. Now, there was only one [58] of the firm of the Brown-Hart Company at the time at the store.

Q. And as I understand you now, that all you claim is that you and Mr. D'Arcy went to the First National Bank, and there spoke to Mr. Christy, and asked him if he would give you a first mortgage against that property, and he take a second mortgage—

A. Well, he had a second mortgage at that time. I just asked him—

(Testimony of Charles A. Hickenlooper.)

Q. Well, just a moment. I am trying to get at now what your understanding was—and he take a second mortgage, or hold a second mortgage, in case you should advance the money to redeem that property from the foreclosure sale? A. Yes, sir.

Q. And Mr. Christy told you—Now, that is what you asked him? A. Yes, sir.

Q. And Mr. Christy told you he thought it could be arranged? A. Yes, sir.

Q. That is all he told you?

A. Yes, sir; and he advised me to go and see the Brown-Hart people and see if they were willing, and he said if they was he thought it could be arranged all right.

Q. And you went to see the Brown-Hart people?

A. Yes, sir.

Q. And saw Mr. Brown? A. Yes, sir.

Q. And Mr. Brown told you that he thought it could be arranged, did he? Now, just what did he say?

A. Well, he told me very similar to what Mr. Christy did; if Mr. Christy had no objection he thought they could arrange that part all right. [59]

Q. And you didn't go back to either Mr. Brown or Mr. Christy, to see whether they would arrange it or not?

A. Well, I think Mr. Brown stated that his partner wasn't there at the time, and he would have to talk it over with him, or something to that effect.

Q. Then, he couldn't do anything until he would see his partner? A. No.

(Testimony of Charles A. Hickenlooper.)

Q. Now, you also stated, Mr. Hickenlooper, as I remember it—as I have a note of it—that Mr. Christy told you that he wasn't going to take any action in the matter? A. Yes, sir.

Q. That was at this same visit? A. Yes, sir.

Q. And Mr. D'Arcy was with you at that time, was he? A. Yes, sir.

Q. He heard that conversation, did he?

A. Yes, sir.

Q. And aside from that you have never had any other conversation with them? A. No, sir.

Q. You are a large stockholder in The Crystal Springs Investment Company, aren't you, and were then? A. Well, I *were* the way that I stated it.

Q. Well, the way that you stated it. I understand you to say that the assets of these two companies were the same, and that you owned about $12,000 worth of stock there?

A. Well, I had a mortgage that was secured by about that much, as collateral.

Q. Oh, you had a mortgage? A. Yes. [60]

Q. Not on their property? What was that mortgage on? Not on the Crystal Springs property?

A. Well, it wasn't a mortgage; it was some notes that were secured.

Q. You had some notes from some of the stockholders of that company?

A. Yes, secured by stock.

Q. And by that certificate of stock of that company as collateral security? A. Yes, sir.

Q. That is all the security you had?

(Testimony of Charles A. Hickenlooper.)

A. Yes. That is, any further than I was interested in the Interstate Company, that held an interest in there, too.

Q. The Interstate Company? Now, let us get that straightened out. The Interstate Company, as I understand, had stock of the Crystal Springs Company? A. Yes, sir.

Q. And you were interested also in the Interstate Company? A. Yes, sir.

Q. Now, you had some stock of the Interstate Company—owned it? A. Yes, sir.

Q. Well, was that up with you as collateral, or did you own the stock? A. I owned the stock.

Q. You owned the stock? A. Yes, sir.

Q. Now, how do you figure that stock that you owned of the Interstate Company? If you held that stock, it being an independent corporation, how did it effect The Crystal Springs Company? [61]

A. Because they held stock in the Crystal Springs Company.

Q. The Interstate Company did? A. Yes, sir.

Q. And you, as a member of the Interstate Company, had an interest in that stock held by the Interstate Company of the Crystal Springs Company?

A. Yes, sir.

Q. Well, you were virtually and really, from the collateral that you held and the stock that you owned in the Interstate Company, a large stockholder in the Crystal Springs Company, weren't you?

A. I considered I was, yes, sir.

Q. The lands described here were at that time

(Testimony of Charles A. Hickenlooper.)

owned by the Crystal Springs Company?

A. Yes, sir.

Q. And are yet, aren't they?

A. Yes, sir, I believe so.

Q. And these two mortgages cover that particular land; isn't that true? A. I think so.

Q. Those lands are worth considerable in excess of those mortgages, aren't they? A. I don't know.

Q. Well, what is your opinion about it?

A. I haven't seen the property for a good while, and I understand that the alkali is raising on them; so I don't know. Since that big canal, I understand that the alkali is raising. That would depreciate the value some.

Q. Well, you had about $12,000.00 of that stock, didn't you say? [62] A. Yes, sir.

Q. Do you consider that good collateral security?

A. Well, I don't know how good I considered it. I accepted it at the time the deal was made.

Q. Do you remember what that company was stocked for?

A. I believe it was incorporated for $60,000.00, if I remember right.

Q. Now, the indebtedness, as I understand, of these two mortgages, is less than $4,000.00?

A. I don't remember.

Q. Right around $4,000.00, with the interest?

A. I don't remember the exact amount.

Q. And you felt pretty safe, didn't you, Mr. Hickenlooper, knowing the value of that property, knowing it as you did, paying off this mortgage, and you

(Testimony of Charles A. Hickenlooper.)

was doing it for the purpose of protecting the stock that you held at that time, didn't you?

A. Well, I felt safe, providing I got what I was led to believe I would get; but I wouldn't have been interested in it any other way.

Q. Would you have let your stock that you had—that collateral stock—go?

A. I certainly would.

Q. For $2,000.00? A. Yes, sir.

Q. Do you mean to say now—

A. Of course, there is other lands in the Crystal Springs Company; you understand that?

Q. Yes, I understand. And you think that $2,000.00 at that time, which is the value of that mortgage— that is, I think you advanced $2,012.00 the pleading states—

A. I was under the impression that it was $2,050.00. I wish you would correct that Mr. Clerk, if it is agreeable. I [63] believe you will remember that I wasn't quite clear. I had to raise some money afterwards, and I was confused or mixed a little on the two.

Q. When did you make a demand on the receiver here, if at all, for a first mortgage on this property?

A. Well, when I went away from here. When I left that night I left a little money with the receiver to pay for the recording of that, with the understanding that as soon as it was made it would be recorded, and he would forward it down to me, and I waited a number of days and then came back up.

Q. Well, did you make a demand on the receiver

(Testimony of Charles A. Hickenlooper.)

for a first mortgage on that property?

A. Well, I made a demand when I came back, when it had not been complied with as it was understood that it would be when I left.

Q. Well, when did you come back?

A. Well, I think it was about ten days afterwards, as near as I can tell.

Q. Where did you make that demand?

A. I went over to the office of the receiver, to know why the mortgage had not been made out, and he referred me to his attorney, Mr Jones, and I went over there, and Mr. Jones said he had been out of town a great deal of the time since, and that it was a little complicated, and so on. I didn't get but very little satisfaction on my trip that time.

Q. Well, what did Mr. D'Arcy say to you at that time? As I understand you to say now, that there was a positive agreement between you and Mr. D'Arcy that you was to have a first mortgage?

A. Well, of course, Mr. D'Arcy was—I don't remember just what he did say in regard to that. He said it was complicated [64] and at that time he asked if I didn't think it would be better for me to take a receiver's certificate, and I told him that I would rather it would stay as it was for a little while, and see if we couldn't get that as we formerly agreed, or along the lines that we were formerly working on.

Q. That is when you came back? A. Yes, sir.

Q. Well, did Mr. D'Arcy—Now, do I understand you to say that Mr. D'Arcy positively promised you—you allege that, and I am trying to get at it—

(Testimony of Charles A. Hickenlooper.)

promised you at the time you advanced this money, that you should have a first mortgage on that property?

A. Well, Mr. D'Arcy said that he would do all he could in his power for me to get that.

Q. Then, you didn't have any agreement with Mr. D'Arcy that you should have, did you?

A. Well, I don't know whether you would call that an agreement or not. He seemed more than anxious for me to get it.

Q. Well, you know, Mr. Hickenlooper, whether or not he agreed to give it to you, don't you?

A. Well, I believe I have made myself plain along those lines, haven't I?

A. Not as far as your pleading—that is what I am asking for. You allege that you and Mr. D'Arcy entered into an agreement whereby you were to have a first mortgage upon that property. Is that true or not true?

A. Well, it is true, along those lines that I have stated.

Q. That is as far as you want to go on that? You don't want to say that that is true? You say along those lines. Now let's cut loose lines out and answer that question, Mr. Hickenlooper, if you can. Is that true or not true? We will say [65] nothing about those lines. I want to know if you had such an agreement with him or not.

A. Well, I told you what Mr. D'Arcy told me in regard to it. Now, he and I were working along together along those lines, with that understanding,

(Testimony of Charles A. Hickenlooper.)

and the other people gave me to understand that they would do that; and that is the way I left it.

Q. And that was all that was ever said, that Mr. D'Arcy was to do anything he could do to get your first mortgage? A. Yes.

Q. And he didn't promise you that he could or that he would, did he?

A. Well, of course, it would depend on the others staying with and doing the right thing with me on the other; that would have to depend on that.

Q. Then, you figure that the other prople (Christy and Brown) actually promised you a first mortgage?

A. Well, they gave me to understand that I could get it. I'll tell you. Neither of them had interest enough to save this property, and all I asked them to do was to just let their mortgages take their places as it then stood. They were not losing a thing. Now, if it had went by default they wouldn't have had anything then, and they did have a second mortgage left if they had done as they gave me to understand that they would do.

Q. Well, but it might not have been that way. They might not take that view of it. If it had gone by default, and a deed had been given to Mr. Rich for the property, if those things had all happened, that the title would have passed to Rich?

A. Yes, sure.

Q. And they wouldn't have had anything. But then you don't know positive that that would have been the result, do you?

(Testimony of Charles A. Hickenlooper.)

A. Well, I think I do. When the time is up within [66] fifteen minutes when that money gets here, it looks very conclusive that they didn't intend to do anything themselves to help it; and they both stated positively to me that they wouldn't.

Q. Now, when were you solicited by Mr. Christy to take up that mortgage over there—to redeem that property?

A. Oh, I was solicited two or three times by letter.

Q. By Mr. Christy? A. Yes, sir.

Q. Have you those letters?

A. I have one of them with me.

Q. Let's see it.

(The witness produced a letter from his pocket, handed it to Mr. Skeen, who examined it, and then handed it to Mr. Hansbrough, who read said letter.)

Mr. HANSBROUGH.—Q. Haven't you made a mistake in the letter you handed me? This letter as I read it, doesn't solicit Mr. Christy. Did you read this letter carefully? (Handing same to witness.)

A. It doesn't what?

Q. Doesn't solicit Mr. Christy. That was my question—when you were solicited. You claim that you were solicited two or three times by Mr. Christy.

A. I may have been mistaken in the letter. (Examening other letters.)

Mr. HANSBROUGH.—(To Mr. W. H. HICKENLOOPER.) What is the date of that letter?

Mr. W. H. HICKENLOOPER.—April 1st, 1910.

WITNESS.—There is the letter, but it is written by you people. (Handing letter to Mr. Hans-

(Testimony of Charles A. Hickenlooper.)

brough.) I was thinking that was from Mr. Christy.

Mr. HANSBROUGH.—Yes; I see that I dictated this letter [67] myself. Now, have you seen this, Mr. Skeen?

Mr. SKEEN.—No, I haven't.

Mr. HANSBROUGH.—Q. Is that the letter you referred to, Mr. Hickenlooper, as soliciting you to do that thing?

A. Well, there was either two or three letters that came to me at different times. Now, soon after this —soon after I put up the money and secured that property—then Mr. Christy began to crowd me, by threatening that he would foreclose on the property if I didn't take care of his end of it as well as the other, and we exchanged a number of letters along those lines—two or three different letters.

Q. You would not say now, Mr. Hickenlooper, that this letter here, which of course was written by this office—I see it is "G. F."—Mr Gagon evidently dictated that—I thought it was myself—it was written by this office—dictated by the junior member of this firm—that this letter is soliciting you to take up that first mortgage, and that he would take a second mortgage? You wouldn't say that that letter—

A. Oh, no. It was crowding me, that they would foreclose on that property and I would lose my money if I didn't take care of them, on top of what I had already done.

Q. Now, the question I asked you—I did it because I take it from your bill of complaint here,

(Testimony of Charles A. Hickenlooper.)

where you say that you were solicited by Christy and his predecessors in interest to take this money—to advance this money—and that he would take a second lien. Now, that is your pleading. Now, "soliciting," of course you understand what that means—they asked you—we asked you—to do that. Now, when did he ask you? A. Mr. Christy?

Q. Yes. A. Well, Mr. Christy didn't ask me.

[68]

Q. He never at any time asked you— A. No.

Q. —to take that up?

A. No; I went to him about that.

Q. Then, you were not solicited by Mr. Christy to— A. Does the complaint so state?

Q. Yes. Well, I will read here—just a moment: "Your orator further says that he was solicited by the said receiver" (that is Mr. D'Arcy) "and by defendant T. H. Christy, his predecessors in interest and the stockholders and subsequent lien claimants of the real estate described in paragraph No. 3, to advance the said sum of $2500.00 with which to redeem said real estate from the sale to S. J. Rich." That is your allegation. Is that true or not true?

A. Well, that part of it isn't.

Q. That isn't true?

A. I didn't so understand that part of it, reading it. Mr. Christy never solicited me—I went to him, as I stated.

Q. You see by this letter of date of April 1st, 1910, Mr. Christy positively there denies that he ever agreed with you that you could have a first lien as

(Testimony of Charles A. Hickenlooper.)

against his mortgage, don't he?

A. Yes; and he also states that at the time I went to him that the money had already been turned over by me. So his denying that might be just as truthful as the other part.

Q. Oh, yes; if a man wanted to take the position that Mr. Christy wasn't telling the truth, he may do it as well on the one ground as on the other.

A. Well, of course he could. Well, he states that in that letter that I had already turned the money over.

Q. Now, I want to ask you about this just a moment; Didn't Mr. Christy say to you at the time that you talked with him [69] at the bank that on account of the Brown-Hart people—didn't he first, I will say, refer you to Mr. John W. Jones, and say that if the Brown-Hart people, who were jointly interested with the bank (that is, the First National Bank), would agree to substitute your loan as a first lien, as to their interest, he would do likewise? Did he say that to you? A. Yes.

Q. I believe you testified to that? A. Yes.

Q. Now, then, you never went back, but you went to see the Brown-Hart people? A. Yes, sir.

Q. You never knew what happened after that, and you never saw Mr. Hart about it?

A. No, sir, I don't believe I saw this gentleman. (Indicating Mr. Charles L. Hart.)

Q. And his statement here, that Mr. Hart, within a few minutes after you were there, called him up over the phone and told him they wouldn't do any-

(Testimony of Charles A. Hickenlooper.)

thing of the kind; when was that called to your attention before?

A. Well, when he wrote it there. That was the first intimation that I had of it.

Q. Now, why didn't you go back to see Mr. Christy, Mr. Hickenlooper, after having that conversation with him, after you had seen Mr. Hart or Mr. Brown?

A. Well, for this simple reason: There was nothing right definite, because Mr. Hart wasn't there at the time, and all that I could have done would have been to have gone back and told him just what Mr. Brown said, and we couldn't have come to any definite conclusion, on that, could we?

Q. Do you know where Mr. Hart was at that time? [70]

A. I don't remember just what he did say in regard to it, but I am under the impression that he said he was out of town. Now, I wouldn't be positive on that. I know we didn't try to find him, because—for some reason.

Q. Well, you were not solicited, either—not by Mr. Christy, and you were not solicited—

A. No. That was an oversight of mine. When the complaint was read to me I didn't notice that that allegation was made in there.

Q. And you were not solicited by Mr. Brown, of the Brown-Hart Company, either? A. No, sir.

Q. Neither one of them? A. No, sir.

Q. You just thought, Mr. Hickenlooper, didn't you, that there was a lot of property down there,

(Testimony of Charles A. Hickenlooper.)

that if this mortgage or sale should take place that the title to all that property would pass out of the hands of the company, and that that collateral that you held wouldn't be good, didn't you—if it did—for anything?

A. Well, it would lessen the value of the holdings.

Q. Your collateral would not have been good for anything?

A. It wouldn't have been as valuable as it would if the property didn't pass.

Q. And you simply took a chance, and went in there and paid your money to redeem that mortgage, to save the property for the company?

A. Yes, sir, with that understanding. [71]

Q. And the company still has that property?

A. I believe so.

Q. You realize, Mr. Hickenlooper, that you have, as against every other claim of the stockholders, you have a first lien—not against this Mr. Christy mortgage, but every other claim, for your money, don't you?

A. No; it isn't right clear to me, Mr. Hansbrough, just what shape it does stand in.

Q. Well, I say, if you have taken up the indebtedness of this company—the mortgage—you realize that the stockholders of this company would owe you for that, and that you would have a preferred claim against the company, don't you, for that amount of money, against everything except this mortgage? A. Well, I think I had ought to.

Q. Well, you would. I say, I am asking you, as

(Testimony of Charles A. Hickenlooper.)

a matter of law, you would as against every lien that had not attached prior to that time?

(No answer.)

Q. Then, Mr. Hickenlooper, if Mr. Christy never made any agreement with you, and never solicited you, then he never violated any agreement, did he?

A. Yes. He led me to understand that it would be fixed that way.

Q. Well, from what you have testified here to, you would not consider that and don't now undertake to say that there was an agreement, do you?

A. Well, I don't know which way you would take it.

Q. Well, now, let's look at it this way just a minute, Mr. Hickenlooper: According to your statement, Mr. Christy told you that if the Brown-Hart people would do that, they would do it?

A. Yes, sir. [72]

Q. And according to the statement made by Mr. Christy to you in his letter, he tells you that the Brown-Hart Company refused to do it.

A. Yes; but he never notified me of that—

Q. But you never went back to him to tell him the Brown-Hart Company would, did you?

A. No, I don't think we went back.

Q. Now, if that were true, and the Brown-Hart Company said to you, "We won't do that," then you had no agreement with him, did you?

A. I'll tell you, Mr. Hansbrough. I was very busy all that day. I was expecting a brother in law down here from the St. Anthony country to furnish

(Testimony of Charles A. Hickenlooper.)

that money, and I had quite a time to locate him, and then found out that he was away from home, and it kept me extremely busy, and I had a man here (Mr. Walker) that was going to look after my interests the next day, and he is here prepared to testify, and I really didn't have the time to go and cover the ground as I would have liked to have done; but the view I took of it was this: That if I were in the place of the bank and the Brown-Hart people, under a condition of that kind, where they wouldn't do anything for themselves at all—they felt that they had other security—I took this view of the case, if I were in their place I would have been willing to do that way, and I believe I would under those conditions, because if I didn't put up the money it would have went by default, as far as either firm was concerned. And now that is the view and that is the grounds I was working on.

Q. Now, just a moment. You speak of other security that they had. What other security did they have?

A. This is a blanket mortgage, as I understand, on that whole big ranch for $2,000.00.

Q. Well, it is on this land, isn't it? [73]

A. Well, it is a blanket mortgage of the whole thing—160 acres off here at Taylor and 400 acres, besides that 330. It was a blanket mortgage of the whole concern. Now, that was my understanding, that they had a blanket mortgage over the whole big concern.

(Testimony of Charles A. Hickenlooper.)

Q. Well, that was just by hearsay, Mr. Hickenlooper?

A. Well, yes, it was hearsay. I haven't seen the mortgage.

Q. And then that is the reason for your statement now, that they had other security that they might foreclose on in the place of this property—the reason that they wouldn't redeem?

A. Yes. Now, the both firms told me that during my conversation.

Q. Now, how long was it after the ten days—I understand you to say that about ten days after this happened you came up and demended your mortgage of Mr. D'Arcy. Did he refuse at that time to give you a mortgage upon that property?

A. No, sir. He said that Mr. Jones had been away from home, and referred me to Mr. Jones.

Q. Did you go to see Mr. Jones? A. Yes, sir.

Q. Did Mr. Jones refuse to give you a mortgage?

A. Mr. Jones—I had quite a time to get to see Mr. Jones. He was very busy that day, and I didn't get to see him until—I got in about nine o'clock in the morning, and I didn't get to see him until very late in the afternoon; and he stated that there was $120.00 more due on that, and Mr. D'Arcy told me the same thing, and that they had made a mistake in figuring up, and he gave as a reason that he hadn't, that he had been out of town a good deal, and that there was still this $120.00 still due, and I made them a check for $120.00. And that is how I became confused.

(Testimony of Charles A. Hickenlooper.)

Q. That was after you came back the ten days afterwards? [74]

A. Ten days or two weeks; something like that.

Q. Well, did they offer you a mortgage at that time, or refuse to give you one?

A. No, Mr. D'Arcy offered me a mortgage, or a receiver's certificate, just which I wanted; but by that time it had developed that these people refused to allow it to take first place, by the time I came back.

Q. Then, you haven't demanded a mortgage since?

A. Well, I told Mr. D'Arcy that I believed I would just as soon it would go along as it was until we could get some understanding in regard to it.

Q. You realize that if you ask Mr. D'Arcy for a mortgage upon that property he will give it to you, don't you?

A. I think he would—a second mortgage.

Q. Yes, that is, that is the best he could do, would be to give you a second mortgage?

A. I understand that. I am not blaming him.

Q. Now, Mr. Hickenlooper, let me ask you this question: At the time that you were talking with Mr. D'Arcy about this first mortgage proposition, isn't it a fact that he said to you, "Now, this property—we haven't the money, of course, but this property will be ample security for you, and you understand there is another mortgage held by the Brown-Hart people and Christy on this property, and that if you redeem this property, that you do it knowing that that mortgage must be taken care of?" Didn't

(Testimony of Charles A. Hickenlooper.)

he tell you that?

A. He said like this: He said, "Now, unless they will agree to that, as soon as you pay this mortgage their mortgage takes first place," and I said, "Under those conditions I wouldn't be interested in it," and he suggested that we go and see them in regard to it. [75]

Q. Well, didn't he tell you at that time that the security was ample if you did that?

A. No, he didn't.

Q. He didn't?

A. Mr. D'Arcy was very fair in regard to that. He says, "I wouldn't advise you," he says,—now here was the words he said: "I wouldn't advise a man that wasn't interested at all to take a chance on that; but," he says, "you have got big interests here, I suppose, anyway," and he said, "Of course, you will have to use your own judgment; but," he says, "I wouldn't advise an outside man to come in and take a second mortgage on that property." He says, "I have been over it," and he spoke at the time, he says, "The alkali is raising on the property."

Q. Well, your "big interests" you referred to were your interests in that company, wasn't it?

A. It was in the company—in all the ranch property.

Q. Well, how much more property has that company got down there?

A. There is 400 acres of deeded land adjoining on to that.

Q. 400 acres in addition to this— A. Yes.

(Testimony of Charles A. Hickenlooper.)

Q. —331 here? A. Yes.

Q. That property is worth $6,000.00 or $8,000.00, isn't it, at the very least? A. Which?

Q. This piece of property?

A. Well, I stated I didn't know the value of the property.

Q. Well, you are in the real estate business, aren't you? [76] A. No, sir, I am in the fruit business.

Q. You haven't had anything to do with real estate? A. No.

Q. You have no idea as to the value of that property? A. A very small idea.

Q. What value—well, of course, if you have little idea, and practically no idea, your evidence wouldn't be worth anything. A. No.

Redirect Examination.

(By Mr. SKEEN.)

Q. Mr. Hickenlooper, referring to the bill of complaint, the 10th paragraph, where you say that you were solicited. Do you think that is too strong a word? A. I do, yes, sir.

Q. And what you mean is that you went to Mr. Christy, and Mr. Christy said that they had other security, and would not protect the property by taking up the S. J. Rich mortgage, and they thought it would be all right to make your mortgage first, provided it was all right with the Brown-Hart people?

A. Yes.

Q. And that was the extent of your conversation with Mr. Christy? A. Yes, sir.

Q. Then, as I understand you, the statement that

(Testimony of Charles A. Hickenlooper.)

you made, that they had other security, wasn't altogether hearsay; it was a statement by Christy and the Brown-Hart people? A. Yes.

Q. What did you say with respect to furnishing money and taking a second mortgage, when Mr. D'Arcy told you that he couldn't give you a first mortgage without the consent of these parties? [77]

A. I told him that I would rather it would stay as it was.

Q. That is, not advance the money and take a second mortgage? A. Oh—you mean at the first?

Q. Yes, at the first.

A. I told him that I wouldn't be interested in it, if it couldn't take its place.

Q. That is, interested in advancing the money?

A. No.

Q. Now, about ten days after the money was advanced and you came up, you say that Mr. D'Arcy was willing to give you a mortgage, but it was a second mortgage? A. Yes.

Q. Second to the mortgage of Christy, or—

A. —First National.

Q. —or First National Bank, and the Brown-Hart Company? A. Yes, sir.

Q. Do you know what connection there was between Mr. Christy and the First National Bank?

A. Which is the First National Bank; that is where Mr. Christy is?

Mr. HANSBROUGH.—Yes, that is the First National.

(Testimony of Charles A. Hickenlooper.)

Mr. SKEEN.—What position, if any, did Mr. Christy hold in the bank?

A. I understood that he was cashier.

Q. And did he tell you so?

A. No; I don't know that that question was sprung.

Q. Now, referring to the other property, I will ask [78] you whether or not it was mortgaged? That is, the other property of the Crystal Springs Investment Company? A. Yes.

Q. To whom?

Mr. HANSBROUGH.—Well, just a moment now. What is the object of that, Mr. Skeen?

Mr. SKEEN.—Well, you went into it, and it is to give an idea of the condition of the other property.

Mr. HANSBROUGH.—Well, I didn't say anything about that other property being mortgaged.

Mr. SKEEN.—No, you didn't; but you brought out the fact that there was other property, leaving the inference that it was clear, and that the Crystal Springs Investment Company was solvent. The purpose is to show that the property was heavily mortgaged.

Mr. HANSBROUGH.—The balance of the property?

Mr. SKEEN.—Yes.

Mr. HANSBROUGH.—Well, I think I shall object. That is, I don't think the inference could be drawn as far as I went. It wasn't my purpose; and I object to that as incompetent.

Mr. SKEEN.—Now, you may answer with respect

(Testimony of Charles A. Hickenlooper.)

to mortgages on the other property.

A. The other property was heavily mortgaged.

Q. And to whom, and in what amounts?

A. Well, now, I don't know that I can tell you.

Q. Do you know of a mortgage to the Salisbury Company, in Salt Lake?

Mr. HANSBROUGH.—Well, just let him answer if he knows.

WITNESS.—Yes, the Salisbury; I have heard that spoken of a number of times. There was Salisbury had a mortgage on it, and I believe someone else had a mortgage. I think there was two mortgages, if I remember right, on the 400 acres. [79]

Q. Would you know the name of the mortgagee if it was mentioned—Standrod & Company?

A. Standrod, yes, because I went to the bank that same day and talked with them.

Q. Now, what was the total amount of these two mortgages?

A. I think the Standrod mortgage was either *$12,-00.00* or $12,500.00, and the other either $5,000.00 or $7,000.00. That is to the best of my recollection; but it isn't very clear to me.

Mr. HANSBROUGH.—Q. You are not positive about that?

A. I haven't had much to do with it. My son has been looking after my interests.

[Testimony of John Walker, for Complainant.]

JOHN WALKER, a witness called in behalf of the complainant, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. SKEEN.)

Q. What is your name? A. John Walker.

Q. Where do you live?

A. Ogden, Weber County, Utah.

Q. Did you know of the Crystal Springs Investment Company in June, 1909? A. Yes, sir.

Q. And did you know Mr. T. H. Christy and W. J. D'Arcy?

A. I met Mr. D'Arcy, but I have never met Mr. Christy.

Q. I will ask you whether or not you were in Blackfoot during the latter part of June, 1909?

A. Yes, sir. [80]

Q. And at whose instance?

A. Why, at the instance of Mr. Hickenlooper and the Interstate Realty Company.

Q. Representing Mr. Hickenlooper as agent?

A. Yes, sir.

Q. Did you have anything to do with the cancellation of the certificate of sale of the S. J. Rich mortgage, if you know of that mortgage?

A. Yes, sir, I know of the mortgage. I was present when the money was tendered to cancel the sale.

Q. Now, prior to that time, I will ask you whether or not you had a conversation with Mr. W. J. D'Arcy, as the receiver of the Crystal Springs Investment

(Testimony of John Walker.)

Company, respecting the S. J. Rich mortgage and the redemption of the property? A. Yes, sir.

Q. You may relate the conversation.

A. Coming to Blackfoot, I immediately got acquainted with Mr. D'Arcy, and called his attention to the fact that by a certain day a mortgage foreclosure would—I think the sale of the foreclosure would be—the time for redemption would expire, and asked him if there was any possible way whereby he might save that redemption, or save the time of expiration of that certificate, in order to protect the interest of the Crystal Springs Investment, by dividing the land, the property that they had, by losing that amount of land and reducing the value of the security or the value of the ranch materially; and he informed me that there was no possible way to his knowledge whereby he could make any effort to redeem it, and I called his attention to the fact that the First National Bank of Blackfoot—there was a mortgage—some kind of a mortgage up there, I believed, as security to those people, that had been a second mortgage on the same property, or including that property, and asked if he thought [81] if they were solicited or if they were reminded of the fact that that mortgage would lose its value by not redeeming that certificate if they wouldn't advance enough money to take that up, in order to make the mortgage that they had the first mortgage—an absolute mortgage—instead of losing it altogether, and giving to them to the amount of money that they had involved in that mortgage a complete mortgage to that three hundred and some acres

(Testimony of John Walker.)

of land—I don't remember.

Q. Now, was that the mortgage referred to in the complaint as the mortgage held by T. H. Christy?

A. Yes, that is the Christy mortgage, I think.

Q. It was then held by the First National Bank?

A. Yes, sir, that was held by the First National Bank; it was there as security.

Q. Now, you may continue.

A. And Mr. D'Arcy was favorable to my going over and mentioning it to these people. I went over to the bank, and Mr. Christy, they told me, or the cashier, whom I presume was Mr. Christy, because I didn't meet Mr. Christy, he was out of town, he was on a vacation. It was indefinite as to the time he should return. It was about a week until the time that the foreclosure certificate would be issued, or the time the redemption would expire, and at the instance of the Hickenloopers I was very anxious that no time should be lost, when it was so near the date, in making some arrangement to protect that property; but the young man who seemed to be the assistant cashier, or someone of sufficient importance or knowledge of the bank's affairs to be left in charge during the absence of the cashier, told me at the first visit—

Q. Just a moment. Do you know who that man was?

A. Well, I am not positive as to the man's name. There were two young men in the bank. [82]

Q. But you don't know whether he was assistant—you spoke of his being assistant cashier.

A. I said I didn't know whether he was assistant,

(Testimony of John Walker.)

but somebody sufficient in authority to be left in charge during the absence of the cashier. He said he wasn't cashier; he was left in charge of the bank's affairs during the absence of the cashier, so he told me. I entered into a conversation with two young men there, and they said that they believed that that mortgage was there, but they didn't know; it was put up with the other stuff, presumably—some certificates of stock in some companies, together with that mortgage, as collateral; and they would find out if I would return. I went back, and they said it was there, but they hadn't had any instructions what to do with it. I wanted to know if Mr. Christy would be back in time to take care of that mortgage. They said they couldn't tell; they didn't think he would. I said, "Don't you feel that your position would justify you in protecting your interest in that mortgage—in advancing the money to redeem this foreclosure sale here?" And they said they didn't know; they didn't think it would; they would find out; that a number of the directors of the banking company were in town, and they could see some during the day and they would let me know. And I went away again. In the meantime I had become pretty well acquainted with Mr. D'Arcy and several of the other boys around town, spending my time in their offices and different places, and going back several times to see these young men who were in charge of the First National Bank.

Q. Now, then, right there, let me interrupt you. Where were these two young men in the bank? Were

(Testimony of John Walker.)

they in the window of the paying teller, or at the cashier's desk?

A. One of them was at the paying or receiving teller's window. As I remember it was just a wicket—a sort of wicketwork [83] in that one room,—and one was up at the paying teller's window, and the other principally working on the books. I was behind the wicketwork, sitting down on chairs there along with them.

Q. And was there anyone else there in charge, or were they in charge there together?

A. They were in charge together.

Q. Now, you may go ahead.

Mr. HANSBROUGH.—Well, just a moment now. Unless he attempts—this charge is direct against Christy, and unless he attempts to connect or bind Christy with it, I object. It would not be competent for any purpose. Of course, I have hesitated—You never saw Christy?

WITNESS.—I never saw Christy.

Mr. SKEEN.—Well, make your objection.

Mr. HANSBROUGH.—I object to it as incompetent, irrelevant and immaterial, and not tending to prove any issue in the case, and move that the evidence in relation to the parties in charge of the bank, or presumed to be in charge of the bank, be stricken out, as incompetent for any purpose, and it does not tend to prove any issue in the case. That's all.

Mr. SKEEN.—Now, you may go ahead.

A. On finally being informed that they would not care to advance the money to protect the interest—

(Testimony of John Walker.)

Q. Now, just a moment. Let me interrupt you.

A. Yes, sir.

Q. You were going to relate, or were relating something with respect to inquiries that these young men were going to make of the directors.

A. Yes, sir; I was just coming to that right now. They reported to me that they didn't think that they could make any effort, and I asked this question: "Providing the people that I represented will advance part of the money, will you advance the [84] other part of that money, to the amount that you think you would be justified in going to protect your interest?" And they said, "Now, we can't say; there are other—there are members of the directorate in the town, and if you will call back this afternoon about two or three o'clock we will call two or three of those people in here and we will give you a definite answer." So I returned in the afternoon about that time, about two or three o'clock, and asked what the conclusions were, and they said, "We have had a conversation with some of the directors of the bank and they say that our interest in the mortgage is not sufficient to justify us in advancing any money; that we have no other security; the mortgage is simply here as collateral, and we don't feel like spending any money on that mortgage at all, in order to stop the foreclosure, or the time for redemption"—the final foreclosure I suppose it would be. So with that effort, seeming to be the last effort to put forth on those people, I communicated with Mr. Hickenlooper that the money would have to be raised there, Mr.

(Testimony of John Walker.)

D'Arcy in the meanwhile asking if I thought it possible that it could be raised, and I said "Yes; I believe if Mr. Hickenlooper is communicated with, why he will advance the money in order to save that land to the good of the company." He said, "Well, we will get in touch with him," and I immediately telephoned to him, and Mr. Hickenlooper came to town the next day.

Q. And what day was that?

A. Why, it was near the end of June. I believe he was here on the 29th of June. I am not positive as to dates. It has been some two years ago, but I think that was the time, because I remember I was here for the purpose of having these people take it up by the 30th of June. It was the day before the money was tendered that he came.

Q. Now, were you with Mr. Hickenlooper on the 30th? [85] A. I met Mr. Hickenlooper here—

Q. Did you go with him—

A. —on the 29th, not on the 30th.

Q. On the 29th? A. Yes, sir.

Q. Did you go with him to the First National Bank? A. No, sir.

Q. You didn't see Mr. Christy?

A. No, sir. I was through with the bank, as far as I was concerned, because I had worked it out to my satisfaction that they would do nothing relative to the redemption of the foreclosure.

Q. Now were you here on the 30th?

A. Yes, sir.

Q. Did you see Mr. D. R. Jones, cashier of the

(Testimony of John Walker.)

State Bank of Blackfoot, on that day?

A. Yes, sir, I did.

Q. What time?

A. I saw him several times during the day; the last time was very close to five o'clock, sometime close to ten minutes to five in the evening.

Q. And where did you see him?

A. In the Blackfoot State Bank.

Q. Now, what if anything, did you do at that time with respect to paying the sheriff $2,012.00, and securing the cancellation of the certificate of sale under the Rich mortgage?

A. With Mr. D'Arcy, I was waiting for the money to be transferred to this bank before the office hours of the sheriff for the day had closed, in order to take up the cancellation of the certificate, and about ten minutes to five, in that neighborhood, a telephone message was received while we were in the State [86] Bank of Blackfoot by Mr. Jones, who said, "It is all right, the money is here"; whereupon he instructed Mr. D'Arcy to make out a deposit slip for the amount of money that was telephoned, giving him a check-book in return, in order that he might spend the money according to the instructions he received, for tendering to the sheriff. Together with Mr. D'Arcy I went across the street to Mr. Jones' office—Attorney Jones—

Q. That is John W. Jones?

A. Attorney John W. Jones, and went to the courthouse about five minutes to five o'clock, and first into the clerk's office, and finally into the sheriff's office,

(Testimony of John Walker.)

and had a little gathering there with those people and turned over the money by check—by D'Arcy's check, and coming from the courthouse, or this courthouse immediately in this direction (indicating), we came back to John W. Jones' office, and before going over to the bank I said, "Now, Mr. Jones, will you draw a suitable mortgage for the securing of this money, according to the contract to-night?" He said, "Why, it is hardly possible for me to do it to-night, but I will attend to it immediately. It is complicated, and I will have to typewrite it all; there is no form that I can use, but I will take care of it," and I said, "All right, I think I will go back to-night; there is nothing that I can do here." He said, "No; I will look after that; but by the way, there will be a fee for filing that, and I don't feel like paying out any money in connection with it; I haven't had any money on the case so far; and how about the filing of the mortgage?" He insisted on having it filed. "Well," I says, "I will advance the money," and I handed him $2.00 and left that night with that understanding—$2.00 to file the mortgage.

Q. Have you had anything to do with it since that time? A. No, sir. [87]

Cross-examination.

(By Mr. HANSBROUGH.)

Q. You don't know, Mr. Walker, the parties' names, you say, that were in the bank, and you never saw Mr. Christy?

A. I never have seen Mr. Christy to my personal knowledge. I did learn the names of the two young

(Testimony of John Walker.)

men in the bank at the time, but I have forgotten at the present.

Q. And you say that they told you at that time—Did they look up the mortgage while you were there?

A. Not the first time that I was there. They looked it up during my absence and had the mortgage when I came back.

Q. You saw the mortgage with him?

A. I saw the mortgage—what he said was the mortgage, but I never read the mortgage.

Q. Well, I mean you saw it in his hand?

A. Yes, sir; they said they had it there, and showed me the papers—a bunch of papers.

Q. And you say they told you that it was merely held as collateral? A. Yes, sir.

Q. And they had other security? A. Yes, sir.

Q. For their debt there? A. Yes, sir.

Q. He also told you that—assigned that as a reason why they wouldn't put up any money on it, was that it—that they didn't need to?

A. They didn't need to, was one of their reasons.

Q. Because they had other security?

A. They had other security.

Q. And were merly holding that as collateral; and that is the reason why they wouldn't, as you understood from them, [88] put up any money to redeem?

A. They gave me to understand that they didn't place sufficient confidence, or sufficient importance, in the mortgage being placed there as collateral for them to spend any more money in connection with it.

(Testimony of John Walker.)

Q. Now, at this time you had first, you say, talked with Mr. D'Arcy about it? A. Yes, sir.

Q. And it was by the direction of Mr. D'Arcy that you went over there and talked with these people, or upon his suggestion?

A. After first suggesting to him about the mortgage there, and about the possibility of those people doing—making the redemption, if they were reminded; then on his suggestion I went to those people.

Q. Well, the question then of a mortgage from Mr.—that Mr. D'Arcy, the receiver, was to give you the one that you say you talked to Mr. Jones about—

A. Yes.

Q. —Mr. D'Arcy didn't refuse to give you a mortgage?

A. No. We hadn't definitely decided between D'Arcy and myself whether it would be a mortgage or a receiver's certificate, or note, or what it would be. My main object was to see that the money was tendered.

Q. That is, paid to the sheriff and redeemed, so that the property be redeemed from that sale—from the Rich sale? A. Yes, sir.

Q. And that was about all that you were here for?

A. Well, that was the main reason that I had in connection with the mortgage.

Q. And when you got that sufficiently redeemed, why you figured, of course, that the taking of the mortgage, or anything [89] that was to pass between Mr. Hickenlooper and Mr. D'Arcy after that,

(Testimony of John Walker.)

they could do themselves, and there was ample time to do it, and you paid not much more attention to it?

A. I had no reason to pay further attention to that, upon the final conversation with Mr. John W. Jones and Mr. D'Arcy, after the money had been tendered.

Q. And you say that Mr. Jones that evening told you that he would attend to it immediately; that he just simply couldn't do it that night? He didn't refuse?

A. It was late that night, and it was going to take considerable work; it had to be typewritten and drawn up, because no form that he had would be suitable for that particular kind of a mortgage that he had to draw,—a receiver's mortgage, or something.

Q. Yes, that's true; there are no forms for those, that' true.

A. Yes, and he said he was willing if I should stay over probably he would do it. I didn't see that it was necessary that I should stay over. I said, "I think I will go back to-night," and gave him the money to file the mortgage. I would have seen to the filing of the mortgage, upon the suggestion of Mr. Hickenlooper, had I remained here.

Mr. HANSBROUGH.—I think that's all.

Mr. SKEEN.—That's all with this witness.

Mr. SKEEN.—It is admitted that the District Court of the Sixth Judicial District of the State of Idaho made and entered its order in the case of A. G. Robert et al. vs. The Crystal Springs Investment Company, granting the plaintiff in this action leave to institute this proceeding, for the purposes desig-

(Testimony of John Walker.)

nated in the bill of complaint. [90]

Mr. SKEEN.—Now, as I claim attorney's fees in there, I would not ask you to admit that I am entitled to it, but if I am entitled to attorney's fees if the mortgage is reinstated and foreclosed, I take it that I would be called upon to introduce some proof as to the reasonableness of the attorney's fees. Now, would you admit that $250.00 is a reasonable fee for foreclosing the mortgage?

Mr. HANSBROUGH.—Well, you are not asking to foreclose the Rich mortgage?

Mr. SKEEN.—Yes—to reinstate and foreclose the Rich mortgage.

Mr. HANSBROUGH.—That would not be out of the way, if you are entitled to attorney's fees at all. I don't think you are entitled to it, but $250.00 would not be unreasonable if the court should finally determine that you are entitled to foreclose that mortgage, and that you are entitled to attorney's fees at all.

Mr. SKEEN.—Yes, and that can stand in the record as a stipulation to that effect?

Mr. HANSBROUGH.—Oh, yes; I admit that.

A recess was thereupon taken until 7:45 o'clock P. M.

At 7:45 o'clock P. M. the hearing was resumed. [91]

[Testimony of W. A. Hickenlooper, for Complainant.]

W. A. HICKENLOOPER, a witness called in behalf of the complainant, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. SKEEN.)

Q. Is your name W. A. Hickenlooper?

A. Yes, sir.

Q. Where do you reside?

A. Salt Lake City, Utah.

Q. Do you know of The Crystal Springs Investment Company? A. Yes, sir.

Q. What, if any, assets has that corporation at this time?

Mr. HANSBROUGH.—Just a moment. We object to that as incompetent, irrelevant and immaterial.

Mr. SKEEN.—You may go ahead.

A. The equity in the property in question in this case, if any—if there be any equity in that property—constitutes the assets of the corporation, as I understand it.

Q. That is the real estate described in the complaint? A. Yes.

Q. What is your business, Mr. Hickenlooper?

A. The land business.

Q. Are you acquainted with land values in the locality where the real estate described in the complaint is located? A. Reasonably well.

Q. How long have you been interested in land in

(Testimony of W. A. Hickenlooper.)

that locality? A. About three years.

Q. And have you bought and sold?

A. To a small degree, I will say.

Q. And have you known of real estate of the character [92] of that described in the complaint having been bought and sold?

A. Yes, I know of a few deals of that sort.

Q. What in your judgment is the real estate described in the complaint worth, at the actual market value?

Mr. HANSBROUGH.—We object to that as incompetent, irrelevant and immaterial to prove any issue in the case.

Mr. SKEEN.—Go ahead.

A. Well, I should say from $3,500.00 to $4,000.00.

Q. Do you know the amount of the judgment secured in the foreclosure proceedings of the Christy mortgage?

Mr. SKEEN.—You may be able to tell me, Mr. Hansbrough. What is it?

Mr. HANSBROUGH.—I don't remember. What did we ask for according to the judgment?

WITNESS.—It was either $2,400.00, or $2,700.00 —approximately that amount.

Mr. GAGON.—$2,080.00, with eight per cent interest from September 5th, 1898, and $400.00 attorney's fees, and costs. That would make it about—

Mr. HANSBROUGH.— —$2,600.00 or $2,700.00.

WITNESS.—About $2,700.00, I think.

Mr. GAGON.—Maybe I can get that exact.

Mr. SKEEN.—Q. Were you present during a con-

(Testimony of W. A. Hickenlooper.)

versation between C. A. Hickenlooper and James Pingree, and during the conversation over the telephone between James Pingree and Mr. Jones, of the Blackfoot State Bank, on the 30th day of June, 1909?

A. Yes.

Q. Did you hear the conversation— A. Yes.

Q. —over the telephone in so far as James Pingree

[93] was talking? A. Yes, I heard all he said.

Q. I will ask you to relate that conversation.

Mr. HANSBROUGH.—We object to the question, and object to the conversation, on the ground that it is incompetent, irrelevant and immaterial, and it does not tend to prove any issue in this case.

Mr. SKEEN.—Now, you may answer.

A. The substance of the conversation was that the sum of $2,012.00 should be charged to the Pingree National Bank, being transferred by telephone, and that that amount was to be given to the receiver—tendered to the receiver, W. J. D'Arcy, upon receipt of a first mortgage on the Sam. Rich property.

Q. Now, was that the conversation? You are stating conclusions. Can you make it more direct, as to what Mr. Pingree said?

Mr. HANSBROUGH.—We object again, because it does not tend in any way to prove any issue in this case. It is incompetent, irrelevant and immaterial; and for the further reason that if that were true, and that was the instructions, and that he did give up that money, your action would be against Jones for the recovery of that money. We object to it as incompetent, irrelevant and immaterial.

(Testimony of W. A. Hickenlooper.)

Mr. SKEEN.—Now, state what Mr. Pingree said over the phone.

A. Of course, I can't remember it very accurately. That is the substance of it, that he said to this effect: "Is this Mr. Jones?" I don't remember the words he used in transferring the money—the exact words he used.

Q. Well, give us the substance.

A. I don't remember the terms that he used, whether he [94] said "Charge us with $2,012.00, and place that amount in the hands of W. J. D'Arcy, receiver, when he tenders you—upon receipt from him of a first mortgage on the Sam. Rich property—"

Q. The Sam. Rich property? That is the S. J. Rich property?

A. Yes—I don't know whether he used words similar to that effect, or slightly different; I can't remember.

Q. Well, was that the substance of it?

A. That was the substance of the conversation.

Q. At whose request did he make those statements, if you know?

Mr. HANSBROUGH.—We object to that also as incompetent, irrelevant and immaterial.

WITNESS.—At the request of C. A. Hickenlooper.

Cross-examination.

(By Mr. HANSBROUGH.)

Q. Where were you at the time? In the Pingree National Bank? A. Yes.

Q. Ogden? A. Yes.

(Testimony of W. A. Hickenlooper.)

Q. That this conversation you say took place?

A. Yes.

Q. Now, you stated about the assets of this corporation. You say that all it has is the equity—that is, in this particular property?

A. So far as I know.

Q. What has become of the other property?

A. Another tract of 400 acres it lost by foreclosure.

Q. Who foreclosed against that?

A. D. W. Standrod & Company. [95]

Q. Do you know what the description of that land was?

A. I can't remember the description of it.

Q. Did you ever see this mortgage—ever look over this mortgage? A. Yes.

Q. Did you ever look over the Standrod mortgage?

A. Yes, sir.

Q. Wasn't the description of these mortgages identical—cover the same property?

Mr. SKEEN.—That is, you mean the Rich mortgage?

Mr. HANSBROUGH.—No. No—the Standrod mortgage and this Mr. Christy mortgage—the one in question—the Clegg mortgage?

A. I don't recall, but I am under the impression that they are, but I can't say positively.

Q. Would you know the mortgage if you should see the description of this property—the property of this particular mortgage—where that land is located?

A. I think so.

(Testimony of W. A. Hickenlooper.)

Q. I will ask you to look at this paper—the description here—move up a little closer to the light, if you care to, and look at the description in that mortgage, and I will state to Mr. Skeen that this is a copy of the complaint and a copy of the mortgage that Christy foreclosed; that is, that is the Clegg mortgage—transferred to Brown-Hart, and from Brown-Hart to Christy—the one in question, you know. Now, that mortgage is on file.

Mr. SKEEN.—Oh, if you say that is the same description—

Mr. HANSBROUGH.—That is the same description. This is my office files in that suit.

WITNESS.—My impression was that this is correct. This mortgage covers both tracts. [96]

Q. Both tracts? A. Yes.

Q. And it doesn't cover any tract up north here formerly owned by Clegg, or anybody else, does it? That is all in the same township and range there, isn't it? A. Yes, all in the same township.

Mr. HANSBROUGH.—And I want to make that clear, Mr. Skeen, because you brought that out, that they had other security, you understand; that was there as collateral.

Q. Now it doesn't cover anything except the Crystal Springs land down there, does it, Mr. Hickenlooper? A. That's all.

Q. That is all the Christy mortgage—the Clegg mortgage—that was transferred from the Brown-Hart Company to Christy? A. Yes.

Q. That is all it covers? A. Yes.

(Testimony of W. A. Hickenlooper.)

Q. Now, then, under that mortgage there is no other security than the land in question—the 331 acres—is there, by reason of the fact that Standrod & Company have absorbed with their mortgage the other 400 acres? In other words, there is only 331 acres of that that this mortgage is a lien upon?

A. At the present time?

Q. Yes. A. That's right.

Q. The Standrod mortgage has taken the balance of the land? A. Yes.

Q. Then, they have no other security for their debt—the Frst National Bank or Christy—but that mortgage?

A. At the present time they have not, to my knowledge. [97]

Q. Well, they never have had any other except the land covered by the Standrod mortgage?

A. That's all I know of.

Q. And that land has since been sold by Standrod & Company, 400 acres, and the time of redemption has expired? A. Yes.

Q. You know nothing about any conversation supposed to have been had about this time between your father and either Christy or the Brown-Hart people, do you?

A. No, I know nothing of that personally.

Q. You were not here? A. I was not here.

Q. Did you have any talk with Mr. D'Arcy about this matter, before it was finally—the money was finally paid to redeem this property? A. Yes.

Q. Well, when if at all did Mr. D'Arcy offer you

(Testimony of W. A. Hickenlooper.)

or agree to give you a first mortgage on that property? I say when if at all? If he didn't at all, then of course my question doesn't go to anything.

A. He never promised me.

Q. Never to you?

A. In fact, I had not talked with him since probably a month previous to the time of the expiration of this redemption—the time of redemption.

Q. Now, you say that this land down there isn't worth over, I think you said $3,500.00 or $4,000.00?

A. That is the estimate I would place on its value.

Q. What character of land is it?

A. Well, most of it is a sandy loam, practically all unbroken, covered with sagebrush, having no water-right. [98]

Q. Do you remember whether the time of redemption of the Standrod mortgage had expired when you took this up?

A. Will you kindly repeat the question?

Q. Do you remember whether or not the time of redemption of the land covered by the Standrod mortgage, and for which the Standrod mortgage was foreclosed, had expired at the time you took this—you redeemed from this mortgage?

A. Standrod hadn't any more than commenced proceedings at that time, if they had done that. I don't know whether they had really commenced proceedings, but that is all they had done. They hadn't secured a judgment; that is, it hadn't come to trial at that time.

Q. They hadn't secured a judgment at that time?

(Testimony of W. A. Hickenlooper.)

A. According to my best recollection.

Q. And at that time if this company had any equity it was in the Standrod property? A. Yes.

Q. And you have redeemed from that sale?

A. Yes.

Q. But they didn't see fit to do so, and didn't redeem? A. Didn't redeem.

Q. Haven't you a private understanding with Standrod & Company, or somebody, for the purchase of that property at what it cost them?

A. I have not.

Q. Has your father? A. Not to my knowledge.

Q. Has any member of this company?

A. Not to my knowledge.

Q. Did you ever talk to them about that, and ask them if they would take their money and interest any time this matter was closed up? [99]

A. I have had—I did have such a conversation.

Q. And didn't you have an understanding with them at that time that you might purchase that?

A. I did at one time, yes.

Q. Has that been called off, or is it good yet?

A. It hasn't been in force for—well, a good many months.

Q. Have they refused to let you have that property? A. They have not.

A. The property is worth a great deal more than their mortgage, isn't it? A. I value it so.

Q. That property there is worth probable double the amount of that mortgage, isn't it?

A. Well, I shouldn't say so. It would be prob-

(Testimony of C. A. Hickenlooper.)

ably rather hard to place a valuation on it. It is in a rather dilapidated and run-down condition at the present time, which naturally detracts from its value.

Mr. HANSBROUGH.—That's all.

Mr. SKEEN.—That's all.

[Testimony of C. A. Hickenlooper, the Complainant (Recalled).]

C. A. HICKENLOOPER, a witness heretofore called in behalf of the complainant, and duly sworn, being recalled in behalf of the complainant, testified as follows, to wit:

Direct Examination.

(By Mr. SKEEN.)

Q. Mr. Hickenlooper, since meeting him here and observing him more closely, I will ask you whether or not in your judgment, this is the man that you talked with, rather than Mr. Brown? **[100]**

A. Well, I have been puzzling my brain over it, but the more I look at him now, I know I have seen him somewhere before, and I may be mistaken in the two men. This man as I look at him becomes more familiar to me. I never saw him only the time I was in the store, and now I may be mistaken in regard to the man and have given the wrong name. I have seen this man somewhere, since I have had a good look at him, and I thought I would just like to say that much.

Q. Correct your testimony in that respect?

A. Yes, sir.

(Testimony of C. A. Hickenlooper.)

Cross-examination.

(By Mr. HANSBROUGH.)

Q. Now, after looking at Mr. Hart, do you still say that Mr. Hart told you—that is, I understand your testimony to be—

A. The man that I talked with.

Q. Yes, if this was the man you talked with, do you still say that this man told you that they would consent to take a second mortgage?

A. That he thought it could be arranged, if it was agreeable with Mr. Christy, and he would talk it over with his partner.

Mr. SKEEN.—Complainant rests, with the understanding that I will probably introduce some further proof from the defendant, Mr. Christy. **[101]**

[Testimony of Charles L. Hart, for Defendants.]

CHARLES L. HART, a witness called in behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. HANSBROUGH.)

Q. Your name is Charles L. Hart, is it?

A. Yes, sir.

Q. And you live in Blackfoot? A. Yes, sir.

Q. And you are a merchant, a member of the firm of the Brown-Hart Company? A. Yes, sir.

Q. And how long have you lived here, Mr. Hart?

A. About 15 years; something like that.

Q. And you have been engaged in this business all of this time?

(Testimony of Charles L. Hart.)

A. Well, not all the time for myself.

Q. No; but I say you have been in business?

A. Yes, I have been in business.

Q. Do you know Mr. Hickenlooper here, the older gentleman there? (Indicating Mr. C. A. Hickenlooper.)

A. Well, sir, I couldn't swear that I do. No, I couldn't swear that I ever saw him before.

Q. I will ask you if you remember either Mr. Hickenlooper or someone else coming into your store—oh, that has been how long ago?

Mr. SKEEN.—June, 1909.

Mr. HANSBROUGH.— — about June, 1909, and speaking to you with reference to your surrendering the mortgage that you held against The Crystal Springs Investment Company, and taking a second mortgage to his, if he would advance the money to redeem from a mortgage that had formerly been foreclosed by Sam. Rich? [102]

A. I remember some conversation with a gentleman that represented himself to be Mr. Hickenlooper. Now, I couldn't say that this is the gentleman.

Q. Now, can you now, Mr. Hart, state that conversation—the substance of it? A. Yes, sir.

Q. Just state it, please.

A. He came and asked in regard to the release of that mortgage and taking a new mortgage in second place, and I told him that I would have to see our attorney, Mr. Jones, before that I could give him any answer on the proposition, which I did; and I didn't see Mr. Hickenlooper afterwards, and never heard

(Testimony of Charles L. Hart.)

of him afterwards on the question.

Q. You may state how long it was after his visit to you before you saw Mr. Jones, your attorney, and took the matter up with him?

A. I took it up immediately, the same evening.

Q. Immediately? A. Yes, the same evening.

Q. You may state now whether or not you had a conversation over the phone, or personally, with Mr. Christy that same day, in reference to this matter?

A. Yes, sir.

Q. Just state what that was.

Mr. SKEEN.—That is objected to as hearsay.

WITNESS.—Well, I don't remember whether Mr. Christy called me up, or called on the matter, or whether I went down to see him in regard to it, and I went and told him our decision; that I had seen our attorney, and he advised us not to do it, and that is the last that I have ever heard of the matter, in regard to that, until now.

Mr. HANSBROUGH.—Q. That was the same day you say that this gentleman that spoke to you was in the store? [103]

A. Yes, sir, the same day.

Q. Did he ever come back to see you, to know what your decision was in that matter, after you told him that you would see your attorney?

A. Not that I know of; at least, he never saw me.

Q. He never saw you? A. He never saw me.

Q. I will ask you, Mr. Hart, if you at any time ever solicited Mr. Hickenlooper here to advance that money for the redemption of that mortgage, and told

(Testimony of Charles L. Hart.)

him that you would take a second mortgage if he would do it? A. No, I never did.

Q. Did you ever interest yourself in any way?

A. Not in the least at all.

Q. That, to have anyone advance money to redeem from that Sam. Rich mortgage? A. I never did.

Q. And the conversation that you have testified to here is the only conversation that you ever had with Mr. Hickenlooper, or anyone else, in reference to this matter, is it? A. Yes, sir.

Cross-examination.

(By Mr. SKEEN.)

Q. What was your interest in the Christy mortgage, Mr. Hart? A. Our interest?

Q. Yes, what was your interest?

A. The amount?

Q. Yes.

A. In the neighborhood of $800.00; I couldn't give the exact amount.

Q. Did you have an assignment of the mortgage? [104]

A. We had an assignment of the mortgage.

Q. And was that assignment prior or subsequent to the assignment held by Christy or the First National Bank? A. Prior.

Q. So yours was the first assignment?

A. Yes, sir.

Q. Did you know that that mortgage was a second mortgage upon the property? A. Yes, sir.

Q. And you knew that it covered real estate other than that covered by the S. J. Rich mortgage?

(Testimony of Charles L. Hart.)

A. I knew it covered all the property down there of the Crystal Springs Investment Company, or supposed to.

Q. Did you know of the foreclosure of the S. J. Rich mortgage? A. Did I know of it?

Q. Yes? A. Yes, sir.

Q. And knew that it would—that the certificate of redemption would mature, entitling the holder to a deed, on June 30th, at the close of the Sheriff's office that evening?

A. I don't remember the date exactly. I remember that it was foreclosed, and the time was about to expire at the time that Mr. Hickenlooper called to see us.

Q. What, if anything, did you do toward protecting your second mortgage after the foreclosure of the Rich mortgage?

A. We hadn't done anything in the matter.

Q. You had expended no money?

A. No money at all.

Q. Had you been requested by the stockholders, or other persons interested in the land, to take up the first mortgage, to protect the interest—

A. Which? The Crystal Springs Company?

[105]

Q. Yes? A. Never. No.

Q. Then, it wasn't your purpose to pay the S. J. Rich mortgage, or secure an assignment of the certificate of sale, or do anything else to protect your interest, was it?

(Testimony of Charles L. Hart.)

Mr. HANSBROUGH.—We object to that as incompetent for any purpose, as to what his purpose was. He didn't do it—he stated that—and that would be all that would be competent.

Mr. SKEEN.—Now, you may answer.

A. I don't remember that we had made any arrangements to take up the matter.

Q. And you intended to permit the certificate to mature, and the Sheriff to give a deed conveying the property?

Mr. HANSBROUGH.—We object again to what he intended to do, as not being competent to prove anything. He didn't do it—that's enough.

Mr. SKEEN.—Now, you may answer.

A. We hadn't made any arrangements up to this time, particularly.

Mr. SKEEN.—Now, will you read the question, please? I don't think that answer was responsive.

(The Special Examiner repeated the last question.)

WITNESS.—I won't say that we did intend to. No, I won't say that we did.

Mr. SKEEN.—Q. Well, you had done nothing further—

A. We had done nothing.

Q. —however, to protect the certificate from maturing,— A. No.

Q. —up to five o'clock of the last day?

A. We had not.

Q. Didn't Mr. Hickenlooper ask you if you wouldn't be [106] willing to do something toward

(Testimony of Charles L. Hart.)

protecting the property? A. No, sir.

Q. Did he ask you if you had any objections to his stepping in and protecting it?

A. He did not, that I know of.

Q. You referred to Mr. Jones; is that John W. Jones, the attorney? A. Yes, sir.

Q. And there is no other John W. Jones, as attorney, in Blackfoot? A. Not that I know of.

Q. He is the person—

A. John W. Jones, the attorney here, is the only one by that name that I know of.

Mr. SKEEN.—I think that's all.

Redirect Examination.

Mr. HANSBROUGH.—Now, with reference to these assignments, the matter that you are speaking of, they are all on file in the case over there. Mr. Hart has answered that he had an assignment.

Q. I will ask you, Mr. Hart, if you didn't assign this mortgage to Christy? A. Yes, sir.

Q. That mortgage? A. Yes, sir.

Q. Prior to the bringing of this suit?

A. Yes, sir.

Mr. HANSBROUGH.—I will say if you want that we will furnish you a certified copy.

Mr. SKEEN.—Oh, no, I will not ask that.

Q. The assignment was made for the purpose of the suit, was [107] it not—foreclosing the mortgage?

Mr. HANSBROUGH.—We object to that as incompetent, irrelevant and immaterial, what it was

(Testimony of Charles L. Hart.)

made for. It was an assignment.

Mr. SKEEN.—Well, you may answer.

A. Well, I didn't understand the question.

Q. The assignment was made for that suit—to secure collection of it?

A. Yes, sir, for the purpose of foreclosing, as I understand it.

Mr. SKEEN.—That's all.

Mr. HANSBROUGH.—That will be all, Mr. Hart.

[Testimony of T. H. Christy, for Defendants.]

T. H. CHRISTY, a witness called in behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. HANSBROUGH.)

Q. Your name is T. H. Christy, is it?

A. Yes, sir.

Q. You live in Blackfoot? A. Yes, sir.

Q. You are cashier of the First National Bank of Blackfoot? A. Yes, sir.

Q. And how long have you lived here, Mr. Christy?

A. Four years.

Q. You have been continuously in that bank since you have been here? A. Yes, sir.

Q. Mr. Christy, I will ask you if you are the T. H. Christy, the owner of the mortgage—that brought the suit for the foreclosure of the mortgage formerly given to the Brown-Hart [108] Company against the—that is, given to Clegg, and assigned to the Brown-Hart Company, and then by them assigned

(Testimony of T. H. Christy.)

to you, against The Crystal Springs Investment Company and W. J. D'Arcy, receiver? Are you the plaintiff in that case, that brought the suit in the lower court to foreclose that mortgage?

A. Yes, sir.

Q. I will ask you, Mr. Christy, to just state how you became possessed of that mortgage.

A. That mortgage was taken as collateral security to a debt owing to the bank by Thomas G. Clegg; that is, for a portion of it; the portion that belonged to the Brown-Hart Company was assigned to me so as to make the foreclosure all in one claim.

Q. And then by the bank it was also assigned to you?

A. It was assigned to me directly, to start with.

Q. By the bank? A. No.

Q. Oh—it was assigned to you directly?

A. Yes, and I held it.

Q. And you held it?

A. Yes, I held it for the bank.

Q. I will ask you if you are acquainted with Mr. Hickenlooper—the older gentleman here? (Indicating Mr. C. A. Hickenlooper.)

A. I have met Mr. Hickenlooper.

Q. When did you meet him?

A. Well, I couldn't say right sure. I think likely my first meeting with him was directly after my return from the Seattle Exposition; I think that was when I first met him, according to my recollection. I know I never met him before I met him at that time.

(Testimony of T. H. Christy.)

Q. I will ask you if you remember when the—or, if you knew of the mortgage that was given by the Crystal Springs Company, I think it was—it was given by them, wasn't it?—or given by Clegg to Sam. Rich? [109]

A. I knew something of that transaction. I knew there was such a deal.

Q. Do you remember that mortgage having been foreclosed in the courts here?

A. I had so heard. I had never examined the records or been in attendance at court, or anything of that kind. I had so heard, that that was the case.

Q. Well, do you remember whether or not that mortgage was redeemed; that is, that there was a redemption took place of that, by Mr. Hickenlooper?

A. I was so informed, yes.

Q. Do you know when that took place?

A. It took place during my absence from Blackfoot, while I was at the Exposition.

Q. Where was that? A. At Seattle.

Q. At Seattle? A. Yes.

Q. Now, I will ask you to state whether or not you ever had any conversation with Mr. Hickenlooper here—this gentleman—(indicating Mr. C. A. Hickenlooper)—as solicited him to redeem that property from the Sam. Rich mortgage?

A. I did not.

Q. Did you ever have any conversation with him at all in reference to redeeming that property from the Sam. Rich mortgage?

A. Not until after it had been reported to me that

(Testimony of T. H. Christy.)

it had been done. We talked it over then, but nothing in reference to the redemption of it at all.

Q. All your conversation was after it had been redeemed? A. It certainly was.

Q. Do you know about when that was, Mr. Christy? [110]

A. I know the date I had the conversation with him.

Q. Well, that's what I mean.

A. On the 5th day of—let me see—the 5th day of July.

Q. What year?

A. That was—let's see—I was just trying to think now—it was the year of the Exposition; that was two years ago, wasn't it?

Q. 1909, then? Yes, it would be 1909?

A. Yes, 1909. It was a year ago last July; that's when it was.

Q. Now, Mr. Christy, you say that that is the only conversation you had with him?

A. In regard to that matter, that was the only time.

Q. Now, just state what that conversation was, if you can, just as near as you can.

A. He and Mr. D'Arcy came into the bank and approached me in regard to the matter, requesting that we release this Clegg mortgage that you have asked me regarding, so as that they might have the first lien on this particular tract of land, and rather suggested as though they intended to pay off this judgment, which is what is called, as we take it, the Sam. Rich judgment. I said to Mr. Hickenlooper

(Testimony of T. H. Christy.)

that I had understood that that had been settled, and as I now remember it he said it had not entirely been, and I said to him that the Brown-Hart Company had the first assignment of that mortgage; that is, whatever their claim was—from Clegg—they had the first right to this mortgage, and that we had the balance, and that if he would go to them that I knew their attorney—at least, that I supposed that their attorney was John W. Jones, and if he would recommend that they release their portion of it that we would do likewise; and it wasn't very many hours—I would say two or three hours after that—when Mr. Hart and Mr. Clegg both, I think, called at the bank, and stated to me— **[111]**

Mr. SKEEN.—Just a moment as to that. That is objected to upon the ground that it is clearly hearsay—a conversation occurring in the absence of the party plaintiff in the case.

Mr. HANSBROUGH.—Well, just go ahead and tell what happened.

A. Mr. Hart and Mr. Clegg called, as I say, within two or three hours, I think; it might have been longer, but it wasn't very long; and stated to me that the Rich judgment had been fully paid and satisfied, and I said, "In that event the lien that we now hold will stay just as it is."

Q. Now, I will ask you if you ever had any further conversation with Mr. Hickenlooper?

A. I don't recall of ever entering into the matter further.

(Testimony of T. H. Christy.)

Q. But this, you say, was the first and only conversation up to that time that you had in reference to that matter? A. It was.

Q. After the matter had been closed—been paid?

A. After it had been paid.

Q. And you never had any conversation with him or anyone else before it had been paid, in reference to releasing your lien? A. None.

Q. And you say you never solicited him to do it?

A. I never did.

Q. Or his son, or anyone else connected with these people, did you, or not? A. No, sir.

Q. No one? A. No one.

Q. You have had considerable conversation—that is, by letter, etc., since,—in reference to the matter?

A. We have had some.

Q. Some correspondence?

A. Some correspondence, where those letters, I think, were referred to, and indirectly, as you may term it. **[112]**

Cross-examination.

(By Mr. SKEEN.)

Q. As I understand you, Mr. Christy, the mortgage foreclosed in your suit against The Crystal Springs Investment Company was originally taken by the First National Bank of Blackfoot as collateral security? A. A portion of it was.

Q. Yes, a portion? A. A portion.

Q. That is, the bank's portion? A. Yes.

Q. And it was taken in your name?

(Testimony of T. H. Christy.)

A. In my name.

Q. You have during all of the time held it for the bank? A. Yes.

Q. And the balance of the interest in the mortgage was taken by you, by assignment from the Brown-Hart Company, for the purpose of foreclosing in the one action?

A. So as to bring the one action. The matter was placed with Mr. Hansbrough to foreclose it all in the one action.

Q. Do you know when the certificate of sale in the S. J. Rich mortgage matured?

A. I don't know of my own knowledge, by examining the records or attending court, but I know in a general way that it was the last day of June, was my recollection.

Q. That is, you have been so informed?

A. Yes, sir. I never examined the record.

Q. Have you made any examination of the records to ascertain when the certificate was taken up by Mr. Hickenlooper? A. I have not. [113]

Q. So when you say that the conversation you had with Mr. Hickenlooper was after the certificate was taken up, you are speaking wholly from hearsay?

A. To a large extent, yes.

Q. How do you fix the date of your conversation with Mr. Hickenlooper as July 5th?

A. I returned from the Exposition—I arrived home the night of the 3d—Saturday—late; the train came in after night. I was at home all day Sunday

(Testimony of T. H. Christy.)

—I might have been at the bank a little while—and Monday was the first day that I was at the bank after that, and it was on that date that he called.

Q. Did you make any note or memorandum of record of the date of your return from Seattle?

A. I did not.

Q. You are speaking from memory in regard to that?

A. I know just exactly what date I got home. I didn't need to. They had a celebration on here—what is called here—oh, some kind of a jubilee. I remember very distinctly when it was, and that was Saturday and Sunday.

Q. You are speaking from memory? A. Yes.

Q. And not as to any record as to that?

A. No, I didn't make any record as to when I returned, but I know of my own knowledge when I did return.

Q. And you are also speaking from memory as to the time when Mr. Hart called on you and told you that the mortgage had been—the S. J. Rich mortgage had been paid, with respect to the time when you had the conversation with Mr. Hickenlooper?

A. Yes; I know it was the same day. I couldn't tell just how many hours after, but I know it was a very few hours—not to exceed two or three hours—but I know it was the same day. [114]

Q. Well, you are depending upon your memory as to that, are you? A. Yes, sir.

Q. That it was the same day?

(Testimony of T. H. Christy.)

A. I didn't set it down anywhere. I didn't need to.

Mr. SKEEN.—I think that's all.

Redirect Examination.

(By Mr. HANSBROUGH.)

Q. You are positive, are you, Mr. Christy, that you were not here—I will first *w*sk you this question: About how long were you gone when you were over to the Exposition there?

A. I think twelve days.

Q. And you returned from there on the 3d day of July, 1909?

A. I got back here on the 3d day of July. I left on the 21st day of June, now; I know when I left.

Q. Then you were not here on the last days of June?

A. I was not; I was in Portland on the last day of June.

Q. Well, the last days, I said; that is, the last two or three days of June? A. Yes.

Q. And you never had any conversation with Mr. Hickenlooper, or anyone else, in reference to his redeeming this mortgage, until after you returned from there? A. I did not.

Q. I want to ask you this: Who was assistant cashier of the First National Bank about the last days of June, or when you returned—when you were gone—of the First National Bank—in 1909? **[115]**

A. D. V. Archbold.

Mr. HANSBROUGH.—That's all.

[Testimony of Charles L. Hart, for Defendants (Recalled).]

CHARLES L. HART, a witness heretofore called by the defendants, and duly sworn, being recalled in behalf of the defendants, testified as follows, to wit:

Direct Examination.

(By Mr. HANSBROUGH.)

Q. Mr. Hart, I didn't know—I didn't think to ask you that question—in fact, I didn't know it myself at that time—I will ask you this question: Do you know the date it was that you had the talk with Mr. Christy? A. I do not.

Q. That conversation you had with him at that time—with Mr. Hickenlooper and Mr. Christy—was that the only conversation you ever had?

A. That is the only conversation I ever had. I don't even know what the date was of the expiration of the redemption.

Q. I see. That is the only conversation you ever had?

A. That is the only conversation I ever had.

Q. You heard Mr. Christy testify about you going to the bank over there and talking to him, did you, about this? A. Yes.

Q. You remember that, do you? **[116]**

A. Yes, I remember that. I remember going in there with Mr. Clegg, but I don't remember whether this was on the same date or not as the other.

Q. You heard him testify that it was?

A. Yes, sir.

Q. You would not say that it was not?

(Testimony of Charles L. Hart.)

A. I would not.

Q. What would be your idea about—what is your recollection about it, if you have any?

A. Well, the evening that Mr. Clegg and I went in over there was the evening, if I remember correctly, that the payment was made. We were both in John Jones' office, or I was, at least, and Mr. Clegg came in and said that the money had passed to the Sheriff to redeem the property.

Q. Well, that was the only conversation you had with Mr. Hickenlooper? A. Yes, sir, it is.

Q. Then you went to John Jones' office?

A. Yes.

Q. And then you went to the bank with Mr. Clegg?

A. I don't remember whether that was the same day or not that I went to the bank with Mr. Clegg; I don't know whether that was the same day or not. If it was, it wasn't the same day Mr. Hickenlooper's evidence shows that we had the conversation; that was a day later. But I don't know—I couldn't give you anything as to dates at all, whether it was in April or May or June, or what it was. I simply remember the conversation in regard to that, and remember going over to Jones' office, in regard to the matter.

Q. But you heard Mr. Christy testify that it was the 5th day of July that you went to the office over there and talked with him? [117]

Mr. SKEEN.—Now, that is objected to as leading.

Mr. HANSBROUGH.—Well, I merely asked him if he heard him testify to that. Now, go ahead.

(Testimony of Charles L. Hart.)

You heard Mr. Christy testify to that?

A. I believe that is the date that he had the conversation with Mr. Hickenlooper he said; isn't that it?

Q. Yes. A. The same date.

Q. The same date—on the 5th of July?

A. On the 5th of July.

Q. Now, you also heard him state that that is the only conversation he had with him in reference to the matter, did you? A. Yes, sir.

Q. Well, do you remember of having but one conversation with Mr. Hickenlooper and Mr. Christy about that matter?

Mr. SKEEN.—I desire that all this matter go in subject to my objection that it is leading.

WITNESS.—I never had but one conversation with Mr. Hickenlooper.

Mr. HANSBROUGH.—Q. Well, do you remember having any more than that one conversation with Mr. Christy; that is, I mean right about that time? You may have talked with him since?

A. I don't remember that we had.

Cross-examination.

(By Mr. SKEEN.)

Q. Now, Mr. Hart, I understand from you that in company with Mr. Clegg you went into Mr. Jones' office the evening of the day when the payment was made to the Sheriff redeeming the land from the S. J. Rich sale; is that right?

A. No; I didn't go to the office with Mr. Clegg; I was there when Mr. Clegg came in. [118]

Q. Oh—you were in Mr. Jones' office and Clegg

(Testimony of Charles L. Hart.)

came in? A. Yes, sir.

Q. And reported to you that the property had been redeemed from the sale? A. Yes, sir.

Q. And you then went to the First National Bank?

A. If I remember correctly. I had forgotten it until Mr. Christy spoke of it. I think we walked to the bank.

Q. That is your recollection, that you went down to the bank then?

A. Now, whether it was the same time. I remember going in there with Mr. Clegg in regard to the matter, and I think it was that same evening.

Q. And at that time you told Mr. Christy that the money had been paid over?

A. So I understood, yes. I wouldn't want you to say that I know positively, but that was simply hearsay.

Q. That is your best recollection, however, as to the time and the circumstances of reporting that to Mr. Christy?

A. Yes, sir. I couldn't say anything about what the date was, or anything about it.

Q. Well, just a moment. You, however, fix the time with regard to the date of the payment?

A. With regard to the date of the payment, yes, sir.

Q. So, you don't know the date of the month, or the year, or the month? A. No, sir.

Q. But you fix it with respect to the date of the payment? A. Yes, sir.

(Testimony of Charles L. Hart.)

Redirect Examination.

(By Mr. HANSBROUGH.)

Q. Just a moment, Mr. Hart; let us get this. Do you know [119] exactly what day the payment was made? Now, here is the point I am asking you, that I want to get at: At the time that you went over to the bank to see Mr. Christy about this matter, did you see Mr. Christy and talk with him?

A. At the time that I went over, yes, sir.

Q. You saw him? A. Yes, sir.

Q. Did you hear Mr. Christy testify that he wasn't here on the last days of June, and wasn't here until the 3d of July? A. I did.

Mr. SKEEN.—I want to object to that as leading, and calling for the witness to pass upon the accuracy and correctness of the testimony of another witness, and tending to impeach the testimony of a witness for the same party.

Mr. HANSBROUGH.—Oh, no, I don't want to impeach him at all.

Q. Now, I will ask you, Mr. Hart, if it was on the 5th day of July that you went to the bank to see Mr. Christy? Was that the same day that you had the talk with Mr. Hickenlooper about that matter? Was it the same day?

A. That Mr. Clegg and I went in there?

Q. Yes.

A. I couldn't say positively. I couldn't say.

Q. Well, you say, though, that you didn't go there but once to the bank with Mr. Clegg?

A. Never but the once.

(Testimony of Charles L. Hart.)

Q. And at the time you did go to see Mr. Christy there and talked with him? A. Yes, sir.

Q. Then, you are not perfectly sure when that payment was made?

A. I don't know what date that payment was made, no, sir. **[120]**

Q. If that payment was made on the last day of June, 1909, and Mr. Christy wasn't in Blackfoot on that day, then it must have been a later date you went to the bank and told him, wasn't it?

Mr. SKEEN.—Just a moment. I object to that upon the ground that it is argumentive, and attempting to induce the witness, by a leading question to make a statement contrary to that which he has already made.

Mr. HANSBROUGH.—Well, that is your objection. Now, read him the question, please.

(The Special Examiner repeated the last question.)

Mr. HANSBROUGH.—It is leading. I won't insist on it. You need not answer it. That question tends to be leading, and it might be argumentive, and I don't want to encumber the record with something that wouldn't be competent. That's all.

[Testimony of W. J. D'Arcy, for Defendants.]

W. J. D'ARCY, a witness called in behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. HANSBROUGH.)

Q. Your name is W. J. D'Arcy? A. Yes.

Q. You live in Blackfoot, Mr. D'Arcy, and have lived here for several years? A. Yes, sir.

Q. In the real estate and loan business?

A. Yes.

Q. You are also the receiver for The Crystal Springs Investment Company? [121]

A. I am.

Q. You are acquainted with Mr. Hickenlooper there, the older gentleman—both of them, I presume?

A. I know the older gentleman, particularly.

Q. I will ask you, Mr. D'Arcy, to state whether or not you ever had any conversation with Mr. Hickenlooper with reference to his redeeming that property from a foreclosure sale, under what is known as the Sam J. Rich mortgage. A. Yes, sir.

Q. When, about, did you have that conversation, Mr. D'Arcy? A. Well, I have had several.

Q. You have had several conversations with him?

A. —conversations with him.

Q. Mr. Hickenlooper, as I understand, advanced the money to you, as receiver, for the redemption of that mortgage? A. Yes, sir.

Q. I will ask you, Mr. D'Arcy,—

(Testimony of W. J. D'Arcy.)

A. That is, it was advanced through him.

Q. I will ask you, Mr. D'Arcy, if you at any time, as receiver of this company, or as a private citizen, ever solicited Mr. Hickenlooper to advance that money for that purpose—solicited—asked him to do it—used your influence to get him to do it?

A. No.

Q. Now, you may state just how—well, I will ask you another question first: Did you or did you not ever promise Mr. Hickenlooper, if he would advance the money to redeem that property from the Sam. Rich mortgage, that you would give him a first mortgage upon that property? A. I never did.

Q. I will ask you to state, Mr. D'Arcy, if you remember just what conversation you had with Mr. Hickenlooper in reference to his [122] redeeming that property, about the time he did redeem it, or that it was redeemed through him?

A. Do you desire for me to relate that conversation now, or if I remember the conversation?

Q. Oh, if you remember the conversation? I say, did you have a conversation with him?

A. Oh, yes. Yes.

Q. About the time he advanced that money?

A. Yes.

Q. Now, you may state what that was.

A. Well, about the time of the—after the Sam. Rich foreclosure, we all understood, everyone that was connected with The Crystal Springs Investment Company, that Kraack & Edwards had purchased that execution, and when about the time for re*p*emp-

(Testimony of W. J. D'Arcy.)

tion was out Mr. Hickenlooper and I had a conversation with reference to the redeeming of that property, and in the course of the conversation Mr. Hickenlooper fully understood from me—and himself, for that matter,—

Mr. SKEEN.—Just state the conversation, and not your understanding.

WITNESS.—Oh—pardon me. In the course of the conversation this was said: that if Mr. Hickenlooper advanced this money that it would go for the benefit of all of the stockholders of The Crystal Springs Investment Company, and I said yes, that's true; that he would have no more rights in that than anyone else, only as a stockholder of the company; and we discussed the thing pro and con, and Mr. Hickenlooper said, "Well, under the circumstances, he was willing to take his chances, anyhow; he guessed the property was sufficient security, anyhow, for that amount of money."

Mr. HANSBROUGH.—Q. Do you remember, Mr. D'Arcy, whether or not he was familiar with this Christy or Clegg mortgage on that property? Did you have a [123] talk about that?

A. Oh, yes; he—

Mr. SKEEN.—Well, I don't want to object all the time—

Mr. HANSBROUGH.—Well, I was just asking him that.

A. Oh, yes, Mr. Hickenlooper was thoroughly conversant with the indebtedness of The Crystal Springs

(Testimony of W. J. D'Arcy.)

Investment Company; in fact, we discussed it pro and con.

Mr. SKEEN.—That is objected to as being a conclusion of the witness, and I move to strike it out.

Mr. HANSBROUGH.—Q. And, as I understand from you, you have testified that there was no talk between you and Mr. Hickenlooper about his having a first mortgage on that property?

A. I don't recall that there was any. I think Mr. Hickenlooper asked the question from me, as I recall it, whether or not he would be placed in the same position as the purchasers of the Sam. Rich mortgage; in other words, in Kraack & Edwards' position; and I said "No, under no circumstances; no."

Q. Then I understand from any conversation he had with you, that you at no time insisted upon his redeeming this property and promised him a first mortgage?

A. Oh, no; quite the contrary, because I told Mr. Hickenlooper emphatically that in the redemption he would only stand as one of the creditors, and he would have to redeem for the whole bunch of stockholders.

Q. I want to read just a little from this complaint. Mr. Hickenlooper further says "that he was solicited by the said receiver and by the said T. H. Christy and his predecessors in interest, to redeem from this sale." That is an allegation in his complaint. I understand from you, you say you never solicited him? A. I never did. [124]

(Testimony of W. J. D'Arcy.)

Cross-examination.

(By Mr. SKEEN.)

Q. You say you had a number of different conversations with him, Mr. D'Arcy? A. Yes.

Q. When did you have those conversations? Do you remember the dates?

A. No, I couldn't tell you the dates at all.

Q. When was it with respect to the maturity of the certificate of sale of the S. J. Rich mortgage?

A. Well, sometime prior to that.

Q. The day before?

A. Oh, it was before that—long before that.

Q. Well, didn't you have a conversation the day before the maturity—the 29th day of June?

A. I don't recall that I did at this time.

Q. When he was up here from Ogden?

A. Mr. Hickenlooper made a great many trips up here, and pretty near every time I saw him we discussed something in connection with The Crystal Springs Investment Company.

Q. Well, do you remember of the redemption of that property?

A. Yes, I do; I have a faint remembrance of that.

Q. Getting the money out of the State Bank of Blackfoot?

A. Yes, I gave a check to the sheriff for the amount.

Q. Now, don't you remember having a conversation with Mr. Hickenlooper the day before that?

A. I don't recall the conversation, but I might have had it.

(Testimony of W. J. D'Arcy.)

Q. And didn't you at that time go with him to the Brown-Hart Company and have a conversation with Mr. Brown or Mr. Hart on that day?

A. I don't recall that I went there with him. I may have done [125] so, but I don't recall it.

Q. Well, do you recall going with Mr. Hickenlooper to the First National Bank at Blackfoot and having a conversation with Mr. Christy?

A. I think I did.

Q. Respecting that? A. I think I did.

Q. And when was that with respect to the date of the maturity of this certificate?

A. Well, it must have been about the same time.

Q. The day before? A. I couldn't say.

Q. Now, Mr. Hickenlooper wasn't here in Blackfoot at the time you received the money from the State Bank at Blackfoot?

A. I don't remember. I don't remember whether he was there or not.

Q. Well, wasn't Mr. Walker there, representing Mr. Hickenlooper?

A. Mr. Walker was here at different times in connection with that.

Q. Well, wasn't Mr. Walker with you at the State Bank when you received the money? Didn't he go with you to the sheriff's office and redeem the property?

A. Well, I'm sure I don't know at this time. I couldn't say. I don't know that Mr. Walker was here and was interested in that thing—in that redemption.

(Testimony of W. J. D'Arcy.)

Q. What do you remember with respect to securing that money? Who was present at that time?

A. Well, it seems to me that the money was telegraphed here.

Q. Yes. A. From Ogden. [126]

Q. Telephoned?

A. Or telephoned. Yes, tele*hp*oned or telegraphed.

Q. To Mr. Jones, of the State Bank?

A. To the bank here, and placed to my credit, and I gave a check for the amount to the sheriff.

Q. You were there at the bank at the time Mr. Jones received a message to pay the money to you and charge it to the Pingree National Bank at Ogden, were you not?

A. No, I wasn't there; I was at the office, I think. Mr. Vanderwood called me at the 'phone.

Q. And then you went over to the bank?

A. Yes, I went over to the bank.

Q. And was Mr. Walker in the office with you when you received the message?

A. In my office?

Q. Yes. A. I don't think he was.

Q. Now, since your attention has been called to some of these things, don't you remember that Mr. Walker went with you over to the sheriff's office to redeem the property?

A. It is possible that he did. Now, Mr. Walker was here—

Q. Isn't that your recollection?

A. Mr. Walker was here at different times in con-

(Testimony of W. J. D'Arcy.)

nection with this thing, as I say, and I can't remember. That was an incident that I didn't pay any particular attention to at all. It is possible he was there; I wouldn't say that he wasn't.

Q. You were around with Mr. Walker more or less, respecting this matter?

A. Yes, more or less, and visited with him, and had a great many social chats with him, and talked about many things.

Q. And was Mr. Walker here at the time you petitioned the [127] Court for an order permitting you to borrow this *mortgage* and give a mortgage?

A. He may have been.

Q. Well, how did you come to petition the Court, if you hadn't some previous arrangement justifying you to ask that you could borrow the money, if you had that authority?

A. Well, all these things were done at the solicitation of Mr. Hickenlooper, and Mr. Walker, too, I remember now.

Q. Well, you were acting as receiver for the company, were you not? A. Yes, sir.

Q. And you were anxious to do all you could for them?

A. All I could, and my course was thoroughly approved by Mr. Hickenlooper,

Q. Yes, and you filed a petition in which you set forth that the property was worth $2,000.00 or $3,000.00 more than the S. J. Rich mortgage?

A. Yes, sir.

Q. And that it was to the best interest of the cred-

(Testimony of W. J. D'Arcy.)

itors that you be permitted to borrow the money and authorize you to give a mortgage to secure payment of it; isn't that right?

A. I think something like that is right. I couldn't recall those things, because I haven't refreshed my memory in connection with it.

Q. And you took the petition and filed it and presented it to the Court, and secured an order authorizing you to do that? A. Yes, sir.

Q. To give a mortgage at 12% interest?

A. I don't remember the interest; but anyway that was a part of the petition. [128]

A. Well, at the time of filing that petition, or prior or subsequent to the filing of the petition, from whom did you attempt to borrow the money?

A. Well, the money all came through Mr. Hickenlooper and Mr. Walker.

Q. But, Mr. D'Arcy, you went to the trouble, and your attorney went to the trouble of preparing and filing a petition requesting authority to borrow that money. Now, didn't you do something in addition to that, towards securing that money, or securing a person who would loan that money to you?

A. I don't recall at this time now soliciting anybody to—

Q. Then do you mean to say, Mr. D'Arcy, that the petition was all an idle formality, and that you went to the trouble of preparing and filing it, and yet didn't ask anybody to loan you the money to comply with the order of the Court?

A. I don't say that the petition was all an idle for-

(Testimony of W. J. D'Arcy.)

mality, or anything of the sort. I do remember that Mr. Hickenlooper promised that money, as I recall it.

Q. He promised that money to you?

A. To redeem that property.

Q. And that is the reason you prepared the petition and secured the order of the Court?

A. Yes, sir.

Q. And you had numerous conversations with them with respect to getting that money?

A. I have talked with him repeatedly about it.

Q. And didn't Mr. Hickenlooper tell you that he would not procure the money to protect the interests of the corporation unless he was given proper security—such security as you were able to give him?

A. Yes; he wanted the mortgage.

Q. He wanted the best security you could give him? [129]

A. I don't remember that he asked the best security, but he wanted the mortgage.

Q. And you were willing to give him the best security you could, under the circumstances?

A. I was willing, yes, sir.

Q. And you asked the Court for authority to give him the best security that lay within your power, or the power of the Court?

A. I don't recall what my petition set forth now. When I was ill, a year ago—something over a year ago—Mr. Hickenlooper came up to my room at that time when I was in bed—

Q. That was after this transaction?

(Testimony of W. J. D'Arcy.)

A. After this transaction, and said I had never secured the mortgage to him.

Q. Well, we don't care about that.

A. You don't care about that? All right.

Redirect Examination.

(By Mr. HANSBROUGH.)

Q. Mr. D'Arcy, you have been in the real estate business here quite awhile? A. Yes, sir.

Q. And know these lands pretty well; and from your knowledge of them are you in a position to say about what the value of those lands are now?

A. Well, at this particular time—I haven't seen those lands—

Q. Well, I mean about the time—I will make it the date of the redemption?

A. Oh, all during that receivership time, when I made so many trips down there, yes, I would say I think so.

Q. What were the lands worth? [130]

A. The whole Crystal Springs Investment Company property, or—

Q. Just this particular property covered by this mortgage?

A. Oh, I would say $30.00 to $35.00 an acre.

Q. That would be $7,000.00 or $8,000.00?

A. Yes, $7,000.00 or $8,000.00.

Q. Now, Mr. D'Arcy, have you ever at any time refused to give Mr. Hickenlooper a mortgage, as directed by the Court—the order of the Court?

A. I never have.

Q. Has he demanded a mortgage lately from you?

(Testimony of W. J. D'Arcy.)

A. He never did demand one.

Q. If he had, would you have given him one?

A. I certainly would.

Q. Would you give him one to-morrow, if he should ask for it? A. Any time.

Q. You have always been ready, have you, to give him a mortgage? A. Always.

Recross-examination.

(By Mr. SKEEN.)

Q. Do you know of the foreclosure and sale of this property in the case of T. H. Christy against the Crystal Springs Investment Company, and I think yourself, as defendants?

A. Pardon me; I didn't catch your question.

Q. I say, do you know of the foreclosure and sale of this property in the case of T. H. Christy against The Crystal Springs Investment Company?

A. I don't know very much about it.

Q. Don't you know that that property sold for something like $2,600.00 or $2,700.00—the whole thing? That is, all the property covered by the S. J. Rich mortgage? [131]

A. I don't know that any of it—

Mr. SKEEN.—That is a fact, isn't it?

Mr. HANSBROUGH.—No, not covered by the S. J. Rich mortgage. You see, the S. J. Rich mortgage—this mortgage covered, as I remember, all that the Standrod mortgage covered.

Mr. SKEEN.—Yes.

Mr. HANSBROUGH.—Well, did the S. J. Rich mortgage cover just this 331?

(Testimony of W. J. D'Arcy.)

Mr. SKEEN.—Yes.

Mr. HANSBROUGH.—Well, then, that will probably be true.

Mr. SKEEN.—It was sold for $2,700.00?

Mr. HANSBROUGH.—$2,777.00, I think, was the amount.

Mr. SKEEN.—Q. And you don't know anything about what the property was sold for?

A. No, I don't know anything about it.

Q. Again referring to your visit to the First National Bank with Mr. Hickenlooper, I will ask you if it was not before Mr. Hickenlooper paid that money to you with which to redeem the property?

A. It may have been; I couldn't say.

Q. Well, isn't it your best judgment and recollection that it was?

A. I haven't anything to refresh my memory about those things.

Q. Now, referring to the object of your visit there, wasn't it for the purpose of discussing the question of priorities of mortgages with Mr. Christy?

A. I don't remember that I was engaged in any conversation. The only one I ever remember discussing at all was with Mr. Hickenlooper; and yet I may have been in a conversation with Mr. Hickenlooper and Mr. Christy at the First National Bank. Mr. Hickenlooper and I so thoroughly understood each other in connection with that matter that—

[132]

Q. Well, isn't it your best recollection that it was before Mr. Hickenlooper paid any money?

(Testimony of W. J. D'Arcy.)

Mr. HANSBROUGH.—I think he has answered the question. He said he don't know.

WITNESS.—I don't remember at all about that, Mr. Skeen.

Mr. SKEEN.—Well, that's all.

Mr. HANSBROUGH.—Q. Do you remember positively, Mr. D'Arcy, that you were at the First National Bank at all with Mr. Hickenlooper?

A. Yes, I do remember being in the First National Bank with Mr. Hickenlooper.

Q. Now, I will ask you this question: Do you remember whether or not you saw Mr. Christy there at the time you were there?

A. I don't remember, and I don't remember the conversation, and don't remember when it was, but I do remember we went in there once.

Mr. HANSBROUGH.—That's all. It is admitted by the defendants that the property described in the complaint sold for the sum of $2,777, on execution, in the case of T. H. Christy against The Crystal Springs Investment Company, and was purchased by T. H. Christy. [133]

[Testimony of Thomas H. Hill, for Defendants.]

THOMAS H. HILL, a witness called in behalf of the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. HANSBROUGH.)

Q. Your full name is— A. Thomas H. Hill.

Q. You reside in Blackfoot, Mr. Hill?

(Testimony of Thomas H. Hill.)

A. Yes, sir.

Q. What is your business?

A. Assistant Cashier of the First National Bank.

Q. How long have you resided here?

A. Two years last October.

Q. And you have been in the bank since you first came? A. Yes, sir.

Q. And how long have you been—Well, that don't make any difference. I will ask you if you were here on the 30th day of June, 1909? A. I was.

Q. I will ask you whether or not Mr. Christy was here at that time, in the town?

A. No, sir, he was not.

Q. Do you know where he was?

A. He was at Seattle—Portland.

Q. And do you know when he returned from Seattle? A. The night of the 3d of July.

Q. The night of the 3d of July? A. Yes, sir.

Q. Do you know how long he was over there—how long he was gone?

A. Oh, about two weeks; something like that.

[134]

Cross-examination.

(By Mr. SKEEN.)

Q. You were in the bank on the 30th day of June, were you, 1909?

A. I was in the bank on the working days, yes.

Q. Did you make any record of the date of the return of Mr. Christy from Seattle?

A. Well, no, only in my mind. There is things that have happened that caused me to remember

(Testimony of Thomas H. Hill.)

when he came back.

Q. Have you no entries in any of your books?

A. No, sir.

Q. You don't live at his house, do you?

A. I did at that time, yes, sir.

Q. You lived at his house? A. Yes, sir.

Q. Did you make any entry in the books at the house? A. No, sir.

Q. You are depending wholly upon your memory?

A. Yes, sir.

Q. As to the date of his return? A. Yes, sir.

Q. And did nothing particular draw your attention to it at that time?

A. Oh, only the fact that at that time they were holding a jubilee here. We had three days session of the Fourth of July, and Mr. Christy came in on the evening of the 3d, and Sunday was the Fourth and then they celebrated again Monday, being the 5th.

Q. Now, those dates are all from memory?

A. Yes, sir; that's all.

Q. Did you know anything about the date of the maturity of the certificate of sale in the S. J. Rich mortgage? A. No, sir. **[135]**

Q. You didn't know anything about that at all?

A. No, sir.

Q. That's all.

Mr. HANSBROUGH.—It is hereby stipulated and agreed by the parties to this action that T. H. Christy had no other security than the 331 acres of land for his mortgage, except the 400 acres of land

(Testimony of Thomas H. Hill.)

that was foreclosed by Standrod & Company, which has been sold under their mortgage, and the date of redemption has expired, and 8,000 or 12,000 shares of stock in The Crystal Springs Investment Company, which is valueless.

Mr. HANSBROUGH.—The defendants rest. [136]

Examiner's Certificate to Testimony.

United States of America, for the
District of Idaho,
Southern Division.

I, Daniel Hamer, Special Examiner, do hereby certify that the witnesses T. H. Crhsity, W. J. D'Arcy Charles L. Hart, Charles A. Hickenlooper, W. A. Hickenlooper, Thomas H. Hill, and John Walker, were by me duly sworn to testify the truth, the whole truth and nothing but the truth; that their said testimony was taken at the office of Messrs. Hansbrough & Gagon, Blackfoot, Idaho, on the 11th day of March, 1911, pursuant to an order of Court heretofore entered herein and by agreement of the respective parties, through their attorneys of record, by me, in shorthand, and that the above and foregoing is a full, true and correct transcript of the testimony of said witnesses as taken by me; that said parties were personally present and represented by their respective counsel, as set forth; and that I am not counsel for or related to any of the parties to said cause, nor otherwise interested in the event of the suit.

IN TESTIMONY WHEREOF, I have hereunto set my hand, this 15th day of March, 1911.

DANIEL HAMER,
Special Examiner.

[Endorsed]: Filed March 16, 1911. A. L. Richardson, Clerk. [137]

In the Circuit Court of the United States, Ninth Circuit, District of Idaho.

IN EQUITY—No. ——.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Assignment of Errors.

Charles A. Hickenlooper, the above-named complainant and appellant, hereby assigns errors in the order and decree of the Circuit Court of the United States for the District of Idaho, in the above-entitled cause, dated the 8th day of July, 1911, in the following particulars:

1. Because the said United States Circuit Court in and for the said District of Idaho, erred in refusing to enter judgment against the defendants and in favor of the complainants for the sum of $2,012.76,

with interest as demanded in the bill of complaint.

2. Because the said Court erred in refusing to subrogate complainant to all of the rights of the said S. J. Rich under the note and mortgage attached as Exhibits "A" and "*H*" to the bill of complaint, and to reinstate and foreclose said mortgage to satisfy a judgment in favor of the said complainant.

3. Because the Court erred in denying complainant a prior lien upon the real estate described in the bill of complaint to secure payment of the money advanced by him for the purpose of protecting the title to said property from the maturity of the certificate of sale referred to in the bill of complaint. [138]

4. Because the Court erred in rendering judgment against the complainant and in favor of the defendants, dismissing the complainant's bill of complaint and rendering judgment in favor of the defendants for costs.

J. D. SKEEN,
Solicitor and of Counsel for Complainant.

Dated, August ——, 1911.

[Endorsed]: Filed August 14, 1911. A. L. Richardson, Clerk. [139]

In the Circuit Court of the United States, Ninth Circuit, District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Petition on Appeal.

To the Honorable FRANK S. DIETRICH, District Judge, and Judge of the Above-named Court, Presiding Therein:

The above-named complainant in the above-entitled cause, conceiving himself aggrieved by the order and decree made and entered by the above-named court in the above-entitled cause, under date of July 8th, 1911, denying the complainant relief demanded by the bill of complaint, and dismissing said cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the said Ninth Circuit, at

San Francisco, California.

Dated this 12th day of August, 1911.

J. D. SKEEN,

Solicitor and of Counsel for Complainant. **[140]**

The foregoing Petition on Appeal is granted and the claim of appeal therein made duly allowed. The bond on appeal is hereby fixed at $500.00.

Dated, August 14, 1911.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed Aug. 14, 1911. A. L. Richardson, Clerk. **[141]**

In the Circuit Court of the United States, Ninth Circuit, District of Idaho.

IN EQUITY—No. 139.

CHARLES A. HICKENLOOPER,

Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Charles A. Hickenlooper, as principal, and C. M. Clay and James M. White, as sureties, are held and firmly bound to T. H. Christy, The Crystal Springs Investment Company, Limited, a corpora-

tion, and W. J. D'Arcy, receiver of the said The Crystal Springs Investment Company, Limited, in the full and just sum of $500.00, to be paid to the said defendants above named, their attorneys, executors, administrators or assigns, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

SEALED with our seals and dated, this 16th day of August, 1911.

WHEREAS, lately, at the Circuit Court of the United States for the District of Idaho, in a suit depending in said Court between the said Charles A. Hickenlooper, complainant and the said T. H. Christy, The Crystal Springs Investment Company, Limited, a corporation, and W. J. D'Arcy, receiver of the said The Crystal Springs Investment Company, Limited, defendants, a decree was rendered against the said Charles A. Hickenlooper [142] and the said Charles A. Hickenlooper having obtained an appeal and filed a copy thereof in the clerk's office of the said Court, to reverse the decree in the aforesaid suit, and a citation directing the said defendants, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date thereof,

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that

If the said Charles A. Hickenlooper shall prosecute his appeal with effect and answer all damages and costs if he fail to make his said appeal good,

then the above obligation to be void; otherwise to remain in full force and virtue.

C. A. HICKENLOOPER.
C. M. CLAY.
JAMES M. WHITE.

State of Utah,
County of Weber,—ss.

C. M. Clay and James M. White being severally duly sworn, each for himself says: That he is worth the sum specified in the foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law.

C. M. CLAY.
JAMES M. WHITE.

Subscribed and sworn to before me, this 16th day of August, 1911.

[Seal] W. R. SKEEN,
Notary Public.

My commission expires July 18, 1913. [143]

The sufficiency of the foregoing bond on appeal is approved as to form and sureties.

_____,
Judge.

[Endorsed]: Approved. Dietrich, Judge. Filed Sept. 5, 1911. A. L. Richardson, Clerk. [144]

In the Circuit Court of the United States, Ninth Circuit, District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Citation.

United States of America,—ss.

The President of the United States to the Defendants T. H. Christy, The Crystal Springs Investment Company, Limited, a Corporation, and W. J. D'Arcy, Receiver of the Said The Crystal Springs Investment Company, Limited, and to George F. Hansbrough and George F. Gagon, Their Attorneys, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED TO BE AND APPEAR at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Circuit Court of the United States for the District of Idaho, wherein Charles A. Hickenlooper is complainant and you are defendants, to show cause, if any there be, why the judgment in the said

appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 5th day of September, A. D. 1911, and of the Independence of the United States the one hundred and thirty-sixth.

FRANK S. DIETRICH,
United States District Judge presiding in the Circuit Court.

[Seal] A. L. RICHARDSON,
Clerk. [145]

Service of the foregoing citation is accepted, this 6th day of September, 1911.

HANSBROUGH & GAGAN,
Solicitors for Defendants T. H. Christy, The Crystal Springs Investment Company, Limited, a Corporation, and W. J. D'Arcy, Receiver of the said The Crystal Springs Investment Company, Limited. [146]

[Endorsed]: Original. No. 139. U. S. Circuit Court, Eastern Division, District of Idaho. Charles A. Hickenlooper, Plaintiff, vs. T. H. Christy et al., Defendants. Citation. Filed Sept. 8, 1911. A. L. Richardson, Clerk. [147]

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relat-

ing, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. **[148]**

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho.

CHARLES A. HICKENLOOPER,
Complainant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,
Defendants.

Clerk's Certificate.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 149, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $70.20, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 8th day of September, 1911.

[Seal] A. L. RICHARDSON,
Clerk. [149]

[Endorsed]: No. 2054. United States Circuit Court of Appeals for the Ninth Circuit. Charles A. Hickenlooper, Appellant, vs. T. H. Christy, The Crystal Springs Investment Company, Limited, a Corporation, and W. J. D'Arcy, Receiver of the Said The Crystal Springs Investment Company, Limited, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho.

Filed October 11, 1911.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time to Docket Cause.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED (a Corporation), and W. J. D'ARCY, Receiver of the Said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED,

Respondents.

Upon application of counsel for complainant, and for good cause shown;

It is ordered that the time to file the record and docket said cause in the U. S. Circuit Court of Appeals be and the same is hereby enlarged and extended from the 5th day of October, 1911, to and including the 15th day of October, 1911.

Dated Oct. 5, 1911.

FRANK S. DIETRICH,

Judge.

[Endorsed]: No. 2054. In the United States Circuit Court of Appeals for the Ninth Circuit. Charles A. Hickenlooper, Appellant, vs. T. H. Christy, The Crystal Springs Investment Company, Limited, a Corporation and W. J. D'Arcy, Receiver of the said The Crystal Springs Investment Company, Limited, Respondents. Order. Filed Oct. 9, 1911. F. D. Monckton, Clerk. Refiled Oct. 1, 1911. F. D. Monckton, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a corporation, and W. J. D'ARCY, Receiver of the said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation,

Appellees.

BRIEF FOR APPELLANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO

J. D. SKEEN,

Solicitor for Appellant, Salt Lake City, Utah.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a corporation, and W. J. D'ARCY, Receiver of the said THE CRYSTAL SPRINGS INVESTMENT COMPANY, LIMITED, a Corporation,

Appellees.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This suit was instituted in the Circuit court of the United States for the District of Idaho by the appellant, a resident of the state of Utah, against the appellees, all residents of the state of Idaho. The jurisdiction is based upon diverse citizenship. The following facts, except as indicated, are admitted by the pleadings and the evidence. (Tr. 1.)

On the 8th day of July, 1907, one Thomas G.

Clegg executed and delivered to one S. J. Rich his promissory note for Fourteen Hundred Dollars ($1400.00), to secure payment of which he and his wife executed and delivered a first mortgage upon about Three Hundred (300) acres of land located in Bingham County, state of Idaho, which the said Clegg then owned. (Tr. 3)

On the 25th day of September, 1908, Clegg and his wife sold and conveyed said real estate, subject to the Rich mortage, to The Crystal Springs Investment Company, a corporation, and on the same day took back a promissory note for $2080.00 secured by a second mortgage covering the same real estate. (Tr. 3.)

On the 26th day of October, 1908, Clegg assigned the second mortgage to the Brown-Hart Company, a corporation, as collateral to secure the payment of an indebtedness from him to it, and on the 23rd day of Februay, 1909, Clegg made a second assignment of the second mortgage to T. H. Christy to secure payment of an indebtedness from Clegg to First National Bank of Blackfoot, Idaho. Christy was cashier of the bank and took the second assignment of the second mortgage for the benefit of the bank, and on the 20th day of April, 1910, Christy took an assignment from the Brown-Hart Company of all its interest in the second mortgage for collection. (Tr. 4, 121).

Payment of the principal and interest on the

first mortgage was not made and early in the year of 1908 Rich instituted proceedings to foreclose the first mortgage. Judgment was taken for $1811.60, the property sold by the Sheriff for Bingham County, Idaho, and a certificate of sale issued, which, under the law of Idaho, entitled the holder to a Sheriff's deed on the 30th day of June, 1909, which deed would, of course, cut off all equities of the mortgagor and subsequent lien claimants. (Tr. 5).

Appellant was the owner of stock in a corporation known as the Clegg-Hickenlooper Ranch Company, which had transferred its assets to the Crystal Springs Investment Company, and under the terms of the transfer appellant was entitled to 12,000 shares of stock in The Crystal Springs Investment Company. He was also interested in a corporation known as the Interstate Realty Company, which in turn held stock in The Crystal Springs Investment Company. (Tr. 70).

On the 28th day of June, 1909, two days before the certificate matured, the receiver filed his petition in the District Court for Bingham County, Idaho, by which he was appointed receiver, reciting his appointment and qualification, and further showing to the court that the certificate of sale, issued at the foreclosure of the first mortgage, would mature on the 30th day of June; that the property was worth a sum greatly in excess of the amount of the judgment,

and prayed for authority to borrow $2500.00 to be used in taking up the certificate of sale and protecting the equity in the property. The petition is attached to the bill as "Exhibit D."

On the 9th day of July, nine days after the certificate would have matured, the court made and entered its order authorizing the receiver to borrow the sum of $2500.00 and secure the repayment of it with a mortgage upon the property described in the bill. The order is attached to the bill as "Exhibit E." (Tr. 22.)

On the 29th day of June, 1909, one day before the certificate of sale matured, because of his interest as a stockholder and at the instance of the receiver of The Crystal Springs Investment Company (Tr. 95), appellant went from Ogden, Utah, to Blackfoot, Idaho, and called on the receiver. (Tr. 63.) Appellant testified that the receiver asked him if he could not take care of the first mortgage. The receiver denied that he made such a request and asserted that appellant proffered to take care of the first mortgage. (Tr. 41, 143). Appellant testified that he replied to the receiver that he thought he could take care of the first mortgage provided he could he protected, but that he would not be interested at all unless the security that was given him would be prior to the mortgage held by Christy and the Brown-Hart Company. (Tr. 63).

The appellant and the receiver then called on Christy at the First National Bank, Blackfoot, Idaho, and Christy stated to them in response to questions asked that he was not going to do anything to protect the property against the certificate of sale; that "he was going to let it go." Appellant then asked him if they would allow his mortgage, that is a mortgage which he was to receive to secure money he thought of advancing to protect the property, to become a first mortgage if he (appellant) protected the property, and Christy replied that he thought it could be arranged, provided the Brown-Hart people, who had the first assignment of the second mortgage, consented, and advised appellant and the receiver to see the Brown-Hart people. (Tr. 60). Appellant and the receiver then called on Hart, of the Brown-Hart Company, and were told by Mr. Hart that he thought it could be arranged if Christy was willing (Tr. 60).

Hart testified that he had a conversation with Hickenlooper and told him that he would have to see Mr. Jones (John W. Jones), their attorney, before he could give him any answer to the proposition. (Tr. 114).

The receiver testified that he did not recall either of the conversations with Christy, with the Brown-Hart people or with appellant. (Tr. 139-140.)

Christy testified that the appellant and the receiver called on him and requested that they release the Clegg mortgage so that the appellant could have first lien on the real estate to secure payment of the money, which he thought of advancing to protect the property against the maturity of the certificate of sale, and he replied that if they would go to John W. Jones, attorney for the Brown-Hart Company, and secure his recommendation on behalf of the Brown-Hart Company, that he would consent. He further testified that about three hours later Mr. Hart and Mr. Clegg called at the bank and stated that the Rich judgment had been fully paid and that he replied, "In that event the lien that we now hold will stay just as it is." (Tr. 123.)

Neither of the assignees of the second mortgage did anything whatever to protect their interests and both indicated to appellant that they would not, and that they regarded what security they may have had in the second mortgage as lost through the foreclosure proceedings. (Tr. 60, 63, 95 and 117.)

After these various conversations appelant left Blackfoot for Ogden on the mid-night train of June 29th, 1909, and on the following day arranged with the Pingree National Bank, of Ogden Utah, for money with which to redeem the property from the sale on the foreclosure of the first mortgage, and about fifteen minutes before five o'clock p. m. of

June 30, at the instance of appellant, James Pingree, cashier of the Pingree National Bank of Ogden, telephoned to D. R. Jones, cashier of the Blackfoot State Bank of Blackfoot, Idaho, and in the presence of appellant told Mr. Jones to pay to the receiver $2050.00 upon receipt of a first mortgage upon the real estate described in the bill. (Tr. 63.)

At the conclusion of the conversation between the cashiers of the two banks, the cashier of the Blackfoot State Bank turned to the receiver and one Walker, whom appellant had requested to look after his interests in the matter, and said, "It is alright, the money is here," and requested the receiver to make out a certificate of deposit for the amount telephoned and to draw his check against the account for the statisfaction of the judgment. The receiver, John W. Jones, who was acting as attorney for the receiver and at the same time as attorney for Brown-Hart Company, and the witness Walker, who was acting for appellant, all went to the Sheriff's office five minutes before the office closed and the certificate matured, and redeemed the property from the sale with the money which appellant had telephoned to the bank. Walker then requested John W. Jones to give him a suitable mortgage to secure the repayment of the money to appellant. Jones stated that the matter was somewhat complicated and he was not then in a position to do so, but that he would

look after it later. He further stated that there would be a filing fee which he did not feel disposed to advance. Walker gave him the filing fee and left. (Tr. 98.)

No mortgage was executed and filed and appellant being anxious about his security returned to Blackfoot about ten days later and called on the receiver, who referred him to John W. Jones, his attorney, but he got no satisfaction from either of them. (Tr. 72.)

During all these transactions The Crystal Springs Investment Company was wholly insolvent and after the 13th day of April, 1909, was in the hands of a receiver.

After the payment of the money, proceedings were instituted in the District Court for Bingham County, Idaho, to foreclose the second mortgage as a first mortgage upon the property. Appellant was not made a party to the suit. Judgment was entered and the property sold under execution to T. H. Christy for the sum of $2770.00. (Tr. 148.) Appellant prayed for judgment for the money advanced and to secure payment of the judgment that he be subrogated to all the rights of the first mortgagee; that the first mortgage be reinstated and foreclosed for his benefit. (Tr. 9.)

The case was submitted to the court upon testimony taken before a special examiner and upon oral

argument on the 8th day of July, 1911, and the court entered judgment dismissing the bill with costs to defendants, from which judgment appellant appeals and assigns the following errors: (Tr. 152.)

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to enter judgment against the defendants and in favor of the complainants for the sum of $2,012.76, with interest as demanded in the bill of complaint.

2. The court erred in refusing to subrogate complainant to all of the rights of the said S. J. Rich under the note and mortgage attached as Exhibits "A" and "B" to the bill of complaint, and to reinstate and foreclose said mortgage to satisfy the judgment in favor of the said complainant.

3. The court erred in denying complainant a prior lien upon the real estate described in the bill of complaint to secure payment of the money advanced by him for the purpose of protecting the title to said property from the maturity of the certificate of sale referred to in the bill of complaint.

4. The court erred in rendering judgment against the complainant and in favor of the defendants, dismissing the complainants' bill of complaint and rendering judgment in favor of the defendants for costs.

ARGUMENT.

We think the record presents four sufficient reasons for reversing the judgment of the lower court and granting the relief prayed.

I.

The holders of the second mortgage and their attorney took an unfair advantage and are estopped from claiming priority.

When appellant went to Blackfoot on the 29th day of June, 1909, one day before the certificate matured, he found that the receiver had no money with which to protect the property and neither of the holders of the second mortgage had made any preparation whatever to protect their security. He was interested only as a stockholder and, of course, knew that both the first and second mortgages must be paid in full before he would be entitled to participate as a stockholder. There is nothing in the record justifying the assumption that he was seeking to induce the holders of the second mortgage to protect his interests or to escape on behalf of the corporation the payment of the second mortgage. The situation was such that it was necessary to take care of the first mortgage and to secure additional time to en-

able the corporation to rehabilitate itself and pay the second mortgage.

At the instance of the receiver appellant and the receiver called on the holders of the second mortgage and learned from them that they did not propose to protect their interests. .(Tr. 63.) there is a slight conflict in the testimony as to just what assurances the holders of the second mortgage gave appellant that they would consent that he should have a first lien upon the property for money advanced to take up the certificate of sale. It is clear, however, that appellant concluded from the conversations that they would consent to such arrangement. (Tr. 66), and it is also clear that the receiver and the holders of the second mortgage all knew that appellant was relying upon the assurances given, was intending to advance the money for the purpose of protecting the property and was expecting a first lien to secure its repayment. They then, perhaps for the first time, saw their opportunity to advance their mortgage to a first lien upon the property. They fully appreciated the confidence appellant had reposed in them, and they likewise appreciated the fact that appelant was confiding in the receiver and their attorney. There was nothing for them to do but to remain silent and trust to the receiver and their attorney to receive and apply the money and to at the same time arrange the priority of the liens on the record.

It is not clear that appellant actually employed John W. Jones to represent him, but it is clear that his confidence in Jones and the receiver and the holders of the second mortgage was such that he employed no other attorney. In this view of the case, it is immaterial whether the various conversations were designedly brought about by the receiver and the holders of the second mortgage or whether they were suggested by appellant. The fact remains that appellant was mislead and deceived by the conversations, if the holders of the second mortgage did not in fact actually promise him the first lien. They at all times knew that appellant was relying upon their assurance and they jointly, as the result of a conspiracy to which both the receiver and his attorney were parties, or severally in their own minds without communication to each other intended to continue the deception and betray appellant's confidence for an advantage.

If such had not been the intent of both Christy and Hart, of the Brown-Hart Company, they would have dismissed the matter from their minds, as neither of them had done anything whatever to protect their security, and both of them had positively asserted that they had no intention whatever of protecting it. Instead, however, Hart actually went to the office of his attorney and remained there during the time their scheme was being consumated by the

payment of the money and was, no doubt, there when Walker demanded security for the money which had just been paid over to the sheriff. The reply of Jones is in all respects consistent with the theory suggested.

Hart immediately left the office and went direct to Christy and informed him that the money had been paid. Christy's reply that they would then insist upon their mortgage as a first lien was but natural in view of their intentions. (Tr. 131.)

Christy then wrote appellant demanding that he pay off the second mortgage also and threatening if he failed to do so to foreclose the second mortgage as a first lein and thereby forfeit the payment made by appellant. (Tr. 76.)

The conduct of John W. Jones in lending himself to the consumation of the scheme, cannot be explained upon any theory consistent with the good faith required at his hands. He was there to receive and pay the money and was in a position to protect all parties and to do exact justice by respecting the confidence reposed in him. He was likewise in a position to perpetrate a gross wrong upon appellant by taking up the certificate and on the record destroying appellant's priority. It is hard to take a more charitable view of the situation in view of the advantages secured to his local client. They sought a pecuniary advantage by sharp practices and the

betrayal of confidence, which equity ought not to tolerate.

II.

The case calls for the application of the maxim: "Equity regards and treats that done which in good conscience ought to be done."

If D. R. Jones, the cashier of the Blackfoot State Bank upon receiving the money telephoned to him by James Pingree, of Ogden, Utah, had followed the instructions given and paid only upon receipt of a first lien upon the property, appellant would have suffered no wrong.

If John W. Jones or the receiver, in paying the money over, had taken an assignment of the certificate of sale, no injustice would heve been done.

If the holders of the second mortgage had done what they assured appellant they were willing to do, there would have been no miscarriage of justice.

The rights of innocent third parties are in no respect involved. The holders of the second mortgage took advantage of the situation, foreclosed their second mortgage as a first lien upon the premises without making appellant a party, and bought the property in on the execution sale for $2,770.00. (Tr. 148.) There is no room to deny the application of

the maxim. To prevent a gross miscarriage of justice the court is called upon to view the situation of the parties as if the certificate of sale had been assigned and the priority continued.

Pomeroy's Equity Jur. 3rd Edition, Sec. 364.

III.

Appellant discharged the first lien at the instance of the receiver and is, therefore, entitled to equitable subrogation.

There is some conflict in the testimony of appellant and the receiver as to whether the receiver asked appellant to advance the money or whether appellant offered to do so. In view of the conduct of the receiver in going with appellant to the holders of the second mortgage and discussing with them the priority of liens and of his various conversations with the witness Walker, his presence at the bank to secure the money and the redemption of the certificate, we think his statement denying that he requested appellant to advance the money should not be seriously considered. Furthermore his failure to remember the important conversations with Hart and Christy casts a suspicion upon his entire testimony. (Tr. 140.) It is clear that appellant was neither a stranger nor a volunteer. What he did

was done with the approval if not at the special request of all concerned.

The rule is stated and applied in the following authorities:

3 Pomeroy's Eq. Jur. 3 Edition Sec. 1211.
Harris on Subrogation Sec. 811 page 559.
Seldon on Subrogation Sec. 245 page 367.

In Tradesmens' Building Association vs. Thompson, 32 N. J. Eq. 133, the court says:

"A person who has lent money to a debtor, may be subrogated by the debtor to the creditor's rights, and if the party who has agreed to advance the money for the purpose employes it himself in paying the debt and discharging the incumbrance on land given for its security, he is not to be regarded as a volunteer. Dixon on Subrogation 165; Payne vs. Hatheway, 3 Vt. 212. The real question in all such cases is, whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor. If the former is the case, he is not entitled to subrogation; if the latter, he is, Cole vs. N. J. Midland R. R. Company, 4 Stew. 105, 136."

Cumberland Building & L. Assn. vs. Sparks
C. C. A. 111 Fed. 647.

Columbus S. & H. R. Co. Appeals, 109 Fed. 177, 210.

Rachel vs. Smith C. C. A. 101 Fed. 159.

Edwards vs. Davenport, 20 Fed. 756.

Barnes Mott, 64 N. Y. 397, 21 Am. Ry. 625.

IV.

Appellant was interested as a stockholder in The Crystal Springs Investment Company, and as such was authorized to pay the money to protect his interests, and aside from the questions herein above discussed, was entitled to subrogation to the rights of the original mortgagee.

This principal is sustained by the following authorities:

Harris on Subrogation, Sec. 811.

Seldon on Subrogation, 2nd Edition, Sec. 245.

Wright vs. Orville Mining Co. 40 Cal. 20.

Bush vs. Wadsworth, 60 Mich, 255, 27 N. W. 532.

The petition and the order attached to the bill as Exhibits "D" and "E" showed an intention on the part of the receiver to give the best security he had even though the mortgage was not desiginated as the first mortgage. The court had the power to authorize the receiver to borrow the money to protect

the property and to give the best security he had. Such security, of course, could not impair the rights of subsequent lien holders. If the appellant had taken an assignment of the certificate, the rights of the second mortgagee would have been in no respect impared.

Tradesmens' Building Assn. vs. Thompson, 32 N. J. Eq., 133.

Appellant is not therefore, prejudiced by the allegation or by the fact that he in a measure relied upon those proceedings. Neither the testimony in the record nor the conduct of the parties furnished any foundation for a conclusion that appellant was "hoping that those interested in the second mortgage would be willing to postpone their lien, but expecting and relying only upon the mortgage which the receiver was authorized to give under the order of the court referred to," or that he was "willing to extinguish the rights of the purchaser on the foreclosure sale with the understanding that the money advanced by him for that purpose should be secured by a mortgage given by the receiver pursuant to the authority conferred upon him by the order of the court." The evidence is all to the contrary.

It is submitted that the cause should be reversed with directions to grant the relief prayed.

Respectfully submitted,

J. D. SKEEN,

Solicitor for Appellant, Salt Lake City, Utah.

NO. 2054

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, a corporation, W. J. D'ARCY, Receiver of the said The Crystal Springs Investment Company, Limited, a corporation.

Appellees.

BRIEF FOR APPELLEES

HANSBROUGH & GAGON,
JOHN W. JONES,
Attorneys for Appellee

Filed 1912

..... Clerk

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES A. HICKENLOOPER,

Appellant,

vs.

T. H. CHRISTY, THE CRYSTAL SPRINGS INVESTMENT COMPANY, a corporation, W. J. D'ARCY, Receiver of the said The Crystal Springs Investment Company, Limited, a corporation.

Appellees.

STATEMENT OF THE CASE

About July 8, 1907, one Thomas G. Clegg and Rachel A. Clegg, made and delivered to one S. J. Rich, their promissory note secured by a mortgage for the sum of $1400.00, on certain real property which is described in Exhibit "B" (pages 10 to 12 transcript), and that sometime thereafter the said Clegg and wife sold the real estate described in said mortgage to one of the defendants and appellees, The Crystal Springs Investment Company, Limited, a corporation, subject to said mortgage; that on the 25th day of September, 1908, the appellee, The Crystal Springs Investment Company, Limited, made and delivered its promissory note for the sum

of $2,080.00, and delivered said note and a mortgage to secure the same on the same real property to Thomas G. Clegg; that some time thereafter the said note and mortgage for $2,080.00 was by said Clegg assigned and sold to the Brown-Hart Company, a corporation, and to appellee T. H. Christy, and afterwards the interest owned by the Brown-Hart Company was by it sold and assigned to the said Christy. That neither the said Crystal Springs Investment Company, nor Thomas G. Clegg, nor any one else paid either of said mortgages, and that a suit was brought in the State Court to foreclose the mortgage described in the bill of complaint as exhibit "B", and the same was regularly foreclosed by decree of the Court about June 30, 1908, and that the mortgage for $2,080.00 given by the Crystal Springs Investment Company to Thomas G. Clegg and so assigned to T. H. Christy, was foreclosed in the State Court about the year 1910, (pages 120-121 transcript); that in the meantime, the appellee Crystal Springs Investment Company went into the hands of a receiver and W. J. D'Arcy was appointed as such receiver (pages 19-24 transcript); and that upon the appointment of the receiver he petitioned the Court to permit him to borrow a sum sufficient to redeem from the foreclosure sale on the mortgage known as the S. J. Rich mortgage, which is fully set out in complainant's exhibit "D" (page 19-22 transcript); that on the 9th of July 1909, the Judge of the District Court of the Sixth Judicial District of Idaho, in and for Bingham County, made an order directing W. J. D'Arcy to borrow a sum sufficient to redeem from said mortgage foreclosure sale of $1911.60, the same not exceeding one-half of the value of the property and the amount to be borrowed not to exceed $2500.00, and the said receiver was by said order directed to execute a mortgage on the property so redeemed to the person from whom he borrowed

the money for said purpose to bear interest at the rate of twelve per cent per annum, (pages 22 to 24 transcript). That pursuant to the order of the Court the said receiver W. J. D'Arcy borrowed from the complainant on the 30th day of June, 1909, the sum of $2,012.76 with which to redeem said property from said mortgage sale (page 7 transcript); and that at said time said receiver offered to give complainant a mortgage on said property so redeemed, pursuant to the order of the Court (pages 145 and 146). And after complainant had loaned the money to the receiver to redeem from said mortgage sale, he refused to accept the mortgage directed to be given by the Court (pages 83 to 84 transcript) and brings this suit, alleging a contract with W. J. D'Arcy, the receiver, and with appellee T. H. Christy, for a first mortgage on the premises, and judgment against the receiver for $2012.76, and that he be subrogated to the rights of the holders under foreclosure sale of the S. J. Rich mortgage. This case was tried at Boise City, Idaho, on July 8th, 1911, before Hon. F. S. Dietrich, Judge, and after due consideration thereof the bill of complaint was dismissed.

ARGUMENT

The complainant and appellant has assigned four errors of the trial Court as follows: 1. That the trial Court erred in refusing to enter judgment against the defendants and in favor of the complainant for the sum of $2012.76, with interest as demanded in the bill of complaint. 2. That the Court erred in refusing to subrogate to all of the rights of the said S. J. Rich under the note and mortgage attached as exhibits "A" and "H" to the bill of complaint, and to reinstate and foreclose said mortgage to satisfy a judgment in favor of the said complaint. 3. That the Court erred in denying complainant a prior lien

upon the real estate described in the bill of complaint to secure payment of the money advanced by him for the purpose of protecting the title to said property from the maturity of the certificate of sale referred to in the bill of complaint. 4. That the Court erred in rendering judgment against the complainant and in favor of the defendants, dismissing the complainant's bill of complaint and rendering judgment in favor of the defendants for costs.

Unfortunately we have not the brief of appellant before us, and consequently are not in a position to follow his argument, but will endeavor to bring our argument under and within the errors as so assigned by him.

The complainant alleges in his bill that he advanced the money, to-wit, $2012.76 for which he is now suing in accordance with an understanding with W. J. D'Arcy, the receiver of the Crystal Springs Investment Company, that the money so advanced should be a loan to the receiver, and was to be secured by a first mortgage upon the real estate described in the bill of complaint. He also alleges in his bill that a petition was filed in the District Court in and for Bingham County, Idaho, that being the Court in which the receiver was acting, asking that the receiver be authorized to borrow a sufficient amount of money to redeem from the foreclosure sale referred to, and that an order was made on said petition by said State Court authorizing the receiver to borrow said amount of money for said purpose (pages 5 and 6 transcript), that both said petition and order are referred to in the bill and marked exhibits "D" and "E" and made a part of the bill.

Complainant further alleges in his bill that he was solicited by the said receiver and by the defendant T. H. Christy, and his predecessors in interest, to ad-

vance the sum of $2500.00 with which to redeem the real estate described in paragraph three of the bill of complaint from the foreclosure sale to S. J. Rich, and that the said receiver contracted and agreed with the complainant that he would give him a first mortgage on the real estate described in the bill, and further alleges that the said T. H. Christy and his predecessors in interest agreed with complainant that his loan would be prior to all other liens, and that pursuant to said agreement the money, to-wit, $2012.76, was by him loaned to the receiver for such purpose (pages 5, 6 and 7 transcript). And complainant further alleges that the receiver failed to execute and deliver to complainant the mortgage upon the said real estate, and that the said T. H. Christy has repudiated his agreement and the agreement of his predecessors in interest that complainant should have a prior and first lien on said premises, in consideration of his loaning the money to the receiver, (pages 7 and 8 transcript), and upon this state of facts the complainant asks to recover in this suit.

The evidence in no way supports the complainant's bill of complaint, nor his contentions thereunder. On the first proposition referring to the order directing the receiver to borrow said money to redeem from said foreclosure sale, which said order is referred to marked exhibit "E" and made a part of the complaint, does not direct that a first mortgage be given but merely directs that the receiver borrow the money and give a mortgage to secure the loan on the property described in the bill and described in the order exhibit "E" (page 22 to 24 transcript). Upon this phase of the case the only inference to be drawn from the allegations of the bill of complaint is that when the complainant loaned the money to the receiver that he expected to be secured in accordance with the provisions and conditions of the order, he had no right to

expect any other or better security and the receiver had no right or authority to give him any other securtiy, and the order only provides that he should have a mortgage.

The evidence upon this point is conclusive, overwhelming, that the receiver has always been ready and willing to give complainant a mortgage upon the premises described in the bill, just what he contracted for. We call the Court's attention to the testimony of W. J. D'Arcy, where he says: "I never have refused to give Mr. Hickenlooper a mortgage as directed by the order of the Court. He never demanded a mortgage of me, if he had I would have given him a mortgage, I would give him one to-morrow or any time if he asks it. I have always been ready to give him a mortgage." (Pages 145 to 146 transcript). Again we call the Court's attention to the testimony of Charles A. Hickenlooper, the complainant himself where he says: "Mr. D'Arcy offered me a mortgage, or a receiver's certificate, just which I wanted." And again he says he does not blame Mr. D'Arcy, that he told Mr. D'Arcy that he would prefer to let the matter rest as it was, that he was satisfied Mr. D'Arcy would give him a mortgage any time he should ask for it. (Page 84 transcript).

We now come to the other question of the pleading above referred to, to-wit, the question of complainant having been solicited to by the receiver and T. H. Christy and his predecessor in interest, to loan the money to the receiver with which to redeem the property in question from the foreclosure sale to S. J. Rich, and to their agreeing with him, appellant, that if he should make the loan that he should have a first mortgage on the premises. We submit that no agreement the receiver might have made to give the appellant a first mortgage would have clothed him

with authority to do so, as the Court's receiver he could only act under and by direction of the Court, and the Court had only directed him to give a mortgage, not a first mortgage, and if he had made such an agreement and there should have been any liability, it would have been a personal liability on his bond as receiver, but if the said Christy had made such an agreemen: whereby appellant was misled to his prejudice, he, Christy, holding a mortgage on the premises as he did, then Christy would probably be bound to take an inferior lien for he would be bound by his contract, and to determine this question we must examine the evidence.

We submit to the Court that there is not a scintilla of evidence in the record to the effect that such an agreement was ever made, or that he was ever solicited to make the loan referred to with the understanding he was to have a first lien, in fact the evidence of appellant himself is to the contrary. On this point we call the Court's attention to the evidence of Mr. T. H. Christy, where he says: He never at any time solicited C. A. Hickenlooper to redeem the property in question from the Sam Rich mortgage. And again he says, that he never had any conversation with him about the redemption of the property until after the property had been redeemed, which conversation was on the 5th day of July, 1909, and that this was the first and only conversation he had ever had up to that time about that mortgage, (pages 123 to 125 transcript). Also call the Court's attention to the evidence of Mr. Charles L. Hart (pages 113-114 and 115 transcript) where he says, he made no agreement whatever with the appellant or any one else with reference to taking second lien on the property mentioned and never solicited appellant to make the loan mentioned. Again Mr. D'Arcy says: He had a conversation with appellant about redeeming the proper-

ty and that he fully understood the matter and that he, D'Arcy, told him that there was no way he could be placed in the same position as the holders of Sam Rich mortgage, that he would have to redeem for them all, that he at no time solicited him to redeem the property or to loan the money with which to redeem it, that he never promised him a first mortgage, but told him he could not give him a first lien, and says at that time appellant told him, the receiver, that he would furnish the money to redeem, as he thought the property was ample security, (pages 135, 136, 137 and 138 transcript).

We again call the Court's attention to the evidence of the complainant and appellant himself on this point where he says: "I was not solicited to make the loan by Mr. Christy, nor Mr. Brown of the Brown-Hart Company, or either of them (page 79 transcript). Again in answer to a question by Mr. Hansbrough after reading as follows: "Your orator further says that he was solicited by the said receiver," (that is Mr. D'Arcy) "and by defendant T. H. Christy, his predecessors in interest, and the stockholders and subsequent lien claimants of the real estate described in paragraph No. 3, to advance the said sum of $2,500.00 with which to redeem said real estate from the sale to S. J. Rich." *Q.* "That is your allegation. Is that true or not true?" *A.* Well, that part of it isn't. I didn't so understand that part of it reading it. Mr. Christy never solicited me, I went to him." (page 77 transcript).

It is clearly shown by the evidence that the complainant and appellant was never solicited by the receiver, T. H. Christy, or any one else, to make the loan for the redemption referred to, and that they, nor either of them, ever contracted or agreed to give him a first mortgage in consideration of his making the loan as alleged in the bill, or at all.

That some conversation was had between the parties regarding the matter, namely, appellant and T. H. Christy and Charles L. Hart of the Brown Hart Company, his predecessor in interest, is shown by the evidence, but the evidence clearly shows that this conversation was had several days after the redemption had been made, and then it shows a positive refusal on the part of Christy and Hart to take a second lien on the property.

We call the Court's attention to the evidence of Mr. T. H. Christy where he says: "I never had any conversation with Mr. Hickenlooper until after it had been reported to me that the property had been redeemed. That conversation was on the 5th day of July, 1909. That was the only conversation I ever had with him in regard to that matter. (Pages 122 and 123 transcript). Again he says: "I returned from the exposition (at Seattle) on Saturday, the 3rd day (July) was at home all day Sunday and saw Mr. Hickenlooper on Monday, the 5th of July, 1909. I got back here on the 3rd day of July, 1909. I left for the exposition on the 21st day of June." Says he was not at Blackfoot from June 21st until July 3rd, 1909, and never had any conversation with Hickenlooper until after his return. (Pages 126, 127 and 128 transcript). Mr. Hart, while he cannot be positive as to dates, says he had one and only one conversation with Hickenlooper about the redemption and one conversation with Christy on the same subject, and that when he went to the bank with Mr. Clegg to see Mr. Christy, he saw and talked with him, this he says was some time about the time the redemption was made. (Pages 129 to 134 transcript).

Mr. Thomas H. Hill, assistant cashier of the First National Bank, says he was in the bank during the absence of Mr. Christy, (the cashier), that he was

there on June 30th, 1909, that Mr. Christy was not there, that he had been absent for two weeks, and returned to Blackfoot on July 3rd, 1909. (Pages 148 and 149 transcript).

Now the evidence of all parties clearly shows that only one conversation between these parties ever took place in reference to this matter, and that Mr. Christy was present, while it is contended by Mr. Hickenlooper that it was on the 30th of June, the day of the redemption, it is still admitted by him that there was only one conversation, that being true, it could not have taken place on June 30th, as Mr. Christy was not in Blackfoot, then it must have been on July 5th, as stated by Mr. Christy. Now we come to what took place the day of the conversation July 5th, 1909, after appellant had advanced the money to redeem. Mr. Christy says, that after his return from the exposition, appellant and Mr. D'Arcy came into the bank and requested that he release the Clegg mortgage and give them a first lien, and intimated that they intended to pay off the judgment known as the Sam Rich judgment, that he informed them that he understood that that judgment had been fully settled, and that appellant said it had not been entirely, that he sent them to the Brown Hart people to talk with them, that an hour or two afterwards Mr. Hart and Mr. Clegg called at the bank and informed him, Christy, that the Rich judgment had been fully paid and satisfied, and he then told them that he would do nothing and that his, Christy's, lien would remain as it was. (Pages 123 and 124 transcript).

We earnestly insist that the evidence clearly shows that no conversation was ever had by the parties with reference to giving appellant a first lien, or lien at all, until the 5th day of July, 1909, after the money had been advanced by him to the receiver and the redemp-

tion made and that his proposition was positively refused.

Appellant pleads an agreement or contract upon which he relies for a recovery in this action and subrogation to the rights of the holder of the certificate of sale under the Rich mortgage.

Appellant has wholly failed to prove the material allegations of his bill of complaint. He is bound by his pleading, and to recover he must prove, the material allegations of his bill of complaint.

Pomeroy on Code Remedies, 4 Ed. Sec. 447 p 613.

When there is a fatal variance between the pleadings and the proof, the bill of complaint should be dismissed.

38 Cyc. Pages, 1563-1564.

Peckinpaugh vs. Lamb. (Kan.) 79 Pac. 673.

Gallandet vs. Kellogg (N. Y.) 31 N. E. 337.

It is a cardinal rule in equity, as in all other pleadings, that the allegata and probata must agree, and that allegations material to the case omitted from the pleadings, cannot be supplied by the evidence.

Murdock vs. Clark	59	Cal.	683
Noonan vs Nunan	76	Cal.	49
Green vs. Covillaud	10	Cal.	317
Clark vs. Phoenix Ins. Co.	36	Cal.	168
McCord vs. Seale	56	Cal.	262-264
Gregory vs. Nelson	41	Cal.	278
Cummings vs. Cummings	75	Cal.	434

Under the rule in equity, plaintiff must prove his

contract as alleged in his complaint, or he is not entitled to recover.

Stout vs. Coffin, 28 Cal. 65
36 Cal. 175

A plaintiff cannot recover upon a cause of action developed by the proofs, but not stated in the complaint.

Burke vs. Levy, 68 Cal. 32

The allegata and probata must correspond in equity, and, however full the proof may be, it is insufficient unless the fact is avered.

Pinney vs. Pinney.
35 So. 95.
46 Fla. 559.

The allegata et probata must correspond in chancery as well as at law.

Robinson vs Morgan.
16 Ky. (Litt. Sel. Cas.) 56.

Relief cannot be granted upon a state of facts disclosed by the evidence, but not alleged in the bill, in the absence of an amendment of the bill so as to make it conform to the facts proven.

Higgins vs. Higgins.
76 N. E. 86.
219 Ill. 146.
109 Am. St. Rep. 316.

A plaintiff cannot file a bill upon one state of facts

and have relief upon another and different state of facts.

Adell vs. Bell.
67 Ill. App. 106.

Harlow vs. Lake Superior Iron Co.
2 N. W. 913.

Evidence of a case not made by the bill, will not support a claim for relief in equity. Proofs must be confined to the issue.

Connerton vs. Miller.
2 N. W. 932.

Relief cannot be given in equity where the case made out by the proofs is different from the case set up in the bill.

Elliott vs. Amazon Ins. Co.
14 N. W. 664.

SUBROGATION

The contention of the appellant in this case at the trial of the case in the lower Court, and we presume will be before this Court from the errors assigned, is that he should be subrogated to the rights of the holder of the certificate of sale under the prior mortgage.

As we view the situation and as we understand the rule in equity, a person asking for equity must do equity, in other words he must come into a Court of equity with clean hands. Appellant's contention having been in the lower Court and being in this Court, that he expected a first lien upon the property and that he advanced the money to the receiver for the

redemption of the property under the former mortgage, expecting to be subrogated to the rights of the holder of the certificate under the prior mortgage, we say is inconsistent with his pleading and the proofs. If he had expected anything at that time, or paid the money with such expectation, he knew it at the time he brought this suit and should have pleaded it. Of course, it is untrue and he could not have sustained such pleading if he had pleaded those facts, because the proof clearly shows that he was relying upon an agreement with the receiver made under and pursuant to the order of the Court, that he should have a mortgage upon the premises to secure him for advancing the money. This, being a fact established clearly by the proof, notwithstanding he pleaded a contract, which he failed to prove.

Now the appellant having entirely abandoned his pleading and the allegations of his bill of complaint is not here asking that the contract and agreement he entered into with the receiver and other defendants, be enforced, and that he be given the security he contracted for or claims to have contracted for, but as suggested in the opinion of the trial Judge, he is asking for a lien which he did not contract for and never expected to receive.

Again, as suggested by the trial Judge in his opinion, (pages 49 and 50 transcript) under the doctrine of equitable assignment or subrogation, he seeks to be put in the place of the mortgagee of the original prior mortgage in disregard of his agreement with the receiver, which was to the effect that he should have a mortgage upon the premises described in the bill of complaint.

Now the question arises, can the appellant be permitted to allege a contract as in this case and as shown

by the evidence here, and totally fail to establish a single allegation of his bill, but by the evidence and his pleading establish a different agreement from that pleaded, and in the face of both the pleading and the agreement established by the evidence, abandon the allegations of his bill and the agreement established by the evidence and ask for and receive different relief? In other words, may he go into a Court of equity and be relieved from proving the material allegations of his bill and also be relieved from a compliance with a contract established by the evidence and have and receive entirely different relief from that contracted for or established by the proof? We think not.

The appellant having contracted for a mortgage on the premises as security for the money advanced, and having failed to prove that he ever contracted for anything different, with any one or that he ever expected to receive anything different, and the evidence clearly showing that the mortgage contracted for has always been and is now available to him, under such circumstances, the doctrine of subrogation will not apply.

As suggested by the trial Judge, "It may be true, if the complainant had entered into an agreement at all with the receiver or any of the parties interested and as a stockholder had advanced to the receiver a sufficient amount to redeem the property, with the expectation of being subrogated, he would be invested with all the rights of the purchaser at the foreclosure sale." Again as suggested by the Court, we say, "That point, however, it is unnecessary to decide. The money was not advanced under such conditions." As before stated, it was advanced under an agreement with the receiver, under and in pursuance to an order of the Court that he should have

a mortgage upon the premises described in the bill to secure the loan to the receiver, and it is perfectly clear from what was done and from the agreement with the receiver for the loan, that the appellant never expected to be subrogated to the rights of the purchaser at the sale.

Again it is clear from the record that the appellant herein is a large stockholder of the corporation, owning approximately $12,000.00 worth of stock (pages 68 to 69 transcript) and also it appears from the record that both of the mortgages mentioned are purchase price mortgages, or amounted to the same thing, the property having been sold to the company in the first instance subject to the prior mortgage in question here and the record showing that the second mortgage was given to Clegg for a part of the purchase price of the property. This being true, it was the moral duty, if not the legal duty, of the appellant as a large stockholder of this company, and he was interested in seeing that these mortgages were paid, because his company had received the benefit of them, and from his act in advancing the money in the way that the evidence shows, he did advance it to the receiver, at the time the loan was made, the presumption is from his act that he realized this and that he had an interest to protect in advancing the money and a duty to perform in seeing that these purchase price mortgages were paid. But afterwards it seems to have occurred to him that there was a chance to defeat the second mortgage, which he is now trying to do.

Another thought occurs to us in this matter, the appellant's counsel laid considerable stress in the lower Court upon the fact that the Crystal Springs Investment Company had gone into the hands of a receiver, which means nothing more nor less than that

by mis-management, presumably, of this corporation, it had been wrecked and from the position occupied by the appellant in this case, the presumption is very strong that he had helped to wreck this corporation. Certainly no one but its stockholders, officers and members could be charged with its condition, and we must bear in mind in this connection that the appellant was a large stock holder, that he must have had something to do with the management and wrecking of this corporation and he should not be heard now to complain of other innocent persons simply because they are seeking to collect their debt from this corporation that has been wrecked and ruined presumably with the knowledge and consent of the appellant himself.

In view of all the evidence in this case and the admissions of the appellant himself, that he has sworn to a bill of complaint, the allegations of which are untrue and that he knew they were untrue when he swore to them, and that none of them are sustained by the evidence but that an entire different state of facts exist from what he alleged, considering his personal interest in the case, the only conclusion to be drawn from all of the facts is that he was a large stockholder in the corporation, that they had failed by mis-management to pay their debts, that the corporation was wrecked and ruined by mis-management presumably, and with the knowledge and consent of the appellant as before stated, and that his only purpose in a Court of equity at this time is to defeat an honest claim, hence we say again that there is no room for the application of the doctrine of equitable assignment or subrogation in this case and that appellant should not be subrogated to the rights of the holder of the certificate of sale of the prior mortgagee.

Another reason occurs to us why he should not be

subrogated and why the doctrine of subrogation should not be invoked in this case. It will be remembered that after loaning the money to the receiver for the purpose of making this redemption, appellant violates his contract himself and refuses to take the security he contracted for and then brings this suit after he had delayed and permitted the holders of the second mortgage to institute proceedings for the foreclosure thereof, and after a decree of foreclosure was entered and the property sold, pursuant to said decree, and after the expense of foreclosure and sale of the second mortgage had all been incurred. It occurs to us that he occupies the position of an interested party whose moral duty at least it was to see that this purchase price mortgage was paid, he having shared in the benefits of it, putting the holder of the second mortgage to all of the expense and trouble that he could and in the end going into a Court of equity and trying to defeat their rights entirely.

Since beginning our brief in this case, we have received a copy of appellant's proposed brief and are pained to note that appellant through his counsel makes an unwarranted and vicious attack upon John W. Jones, attorney for the receiver.

In as much as this is a direct attack upon the attorney in the case by another attorney and is not warranted in any way and is wholly unsupported by any evidence or by anything connected with the case, in our opinion it should not go unnoticed.

In this regard we will say that Mr. Jones has always been the attorney for the receiver and has had nothing whatever to do with the interest of Appellee Christy. He has stood ready at all times under the direction of the receiver to draw up and prepare the mortgage directed to be executed by the order of the Court. We know Mr. Jones to be a gentleman of

high standing, both as a lawyer and a citizen and we know that his actions in this matter have been above reproach as they have always been in other matters.

Permit us to say in comment upon the attack of appellant and his counsel in this case upon Mr. Jones, that as we view the situation from all the circumstances in this case and the condition of the record, appellant and his counsel are not in a position to make any attack upon any one connected with the case. When we consider that the record shows that Mr. Skeen has been the attorney for the complainant from the beginning of this litigation, that he drew the bill of complaint in this case, that his client swore to it, and came into Court under it, and there utterly failed to prove a single material allegation of his bill of complaint and was compelled, as shown by the record, in Court to admit that his bill was absolutely untrue, none of the allegations thereof being supported by the proof, we say again that neither appellant nor his counsel are in a position to charge any one in this case with unfair dealings, especially in view of the fact that there is not a scintilla of evidence in the record to support the charges made in their brief, and the charge of conspiracy against Mr. Jones, the receiver and other defendants in this case, is simply preposterous, and passes comprehension. As we view the matter, it is but another exhibition of the willingness of appellant to say or do almost anything that appears to be necessary to enable him to prevail in this case, without any evidence or reason whatever to support it.

We earnestly submit that in view of all the facts

and circumstances in this case, that the trial Court committed no error, that the decree of dismissal in said cause was proper and that the judgment and decree of the lower Court should be affirmed.

Respectfully submitted,

HANSBROUGH & GAGON,
Attorneys and Solicitors for Appellee Christy,

RESIDENCE—Blackfoot, Idaho.

This Brief on Appeal is adopted by W. J. D'Arcy, Receiver.

JOHN W. JONES,
Attorney and Solicitor for the Receiver,

RESIDENCE—Blackfoot, Idaho.

No. 2055

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt,

PURCELL SAFE COMPANY, a corporation,

Petitioner and Appellant.

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing Business as S. C. OSBORN & COMPANY, Bankrupt,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

No.

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In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.* PURCELL SAFE COMPANY, a corporation, *Petitioner and Appellant.* vs. NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing Business as S. C. OSBORN & COMPANY, Bankrupt, *Appellee.*	No. 4474.

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In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.*	No. 4474. In Bankruptcy.

PETITION.

To the Honorable John P. Hoyt, Referee in Bankruptcy:

Comes now the Purcell Safe Company, a corporation, and respectfully states:

I.

That during all of the times hereinafter mentioned it has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and has paid its annual license fee last due to the State of Washington, and during all of said times has been and now is the owner of a certain group of one thousand and twenty (1020) safe deposit boxes built for said S. C. Osborn, doing business as S. C. Osborn & Company, and installed at No. 507 Third Avenue, in the City of Seattle, Washington, and hereinafter referred to; that during all the times herein mentioned said S. C. Osborn was doing business as S. C. Osborn & Company, at the City of Seattle, in the County of King in the State of Washington, of which said county and state he was, during all of said times, a resident; that heretofore on the 28th day of December, 1910, by a decree entered herein Nelson W. Parker was duly appointed trustee of the bankrupt estate of said S. C. Osborn, and duly qualified as such, and at all times since has been and now is such duly qualified and acting trustee of such bankrupt estate of said S. C. Osborn.

II.

That on the 16th day of February, 1910, the said Purcell Safe Company entered into a certain conditional sale contract, in writing, with the said S. C. Osborn, doing business as S. C. Osborn & Company, under and by the terms of which the said Purcell Safe Company agreed to sell and deliver to the said S. C. Osborn, at the City of Seattle, Washington, said personal property hereinbefore in Paragraph 1 described, for the agreed sum and price of Five Thousand One Hundred Seventy-Four ($5,174.00) Dollars, of which sum Two Thousand ($2000) Dollars was, on said date, paid in cash, and the balance was to be paid in twelve months from said date, with interest at seven per cent. (7%) per annum and was evidenced by the promissory note of said S. C. Osborn, doing business as S. C. Osborn & Company, made and delivered simultaneously with the making of said conditional sale contract, a copy of which note is hereto attached marked Exhibit "A," hereby referred to and made a part of this petition; and that in and by said written contract it was agreed, among other things, that said Purcell Safe Company did not part with or relinquish its claim on or title to said personal property until the said note should be fully paid, and that in default of payment of said note, said Purcell Safe Company, without process of law, might take possession of and remove said personal property; that pursuant to said contract said Purcell Safe Company delivered said personal property hereinbefore in Paragraph 1 hereof particularly described to said S. C. Osborn, doing business as S. C. Osborn & Company, on the 16th day of February, 1910, and that at all times after the making of said contract and the delivery of said personal property to said S. C. Osborn, the same has been and is now situated in said store-room No. 507 Third Avenue, in the City of Seattle, Washington, and from the time of such delivery thereof until the appointment of said Trustee herein, was in the possession of the said S. C. Osborn, and at all times since the appointment of said trustee has been and now is in the possession of said trustee, who

took possession thereof from and under said S. C. Osborn, doing business as S. C. Osborn & Company, and not by virtue of any other claim or right; that said written contract, containing a memorandum of such sale and stating its terms and conditions and signed by the vendor and vendee, was duly filed in the office of the auditor of said King County on the 21st day of February, 1910.

III.

That by the terms of said contract there became due and payable to said Purcell Safe Company from the said S. C. Osborn, doing business as S. C. Osborn & Company, on the 16th day of February, 1911, the sum of Three Thousand One Hundred Seventy-four ($3,174.00) Dollars, together with interest thereon from the 16th day of February, 1910, at the rate of seven per cent. (7%) per annum, but the said sum and interest have not been paid, nor any part thereof, except the interest thereon to August 16, 1910, and by reason of the default in said payment, said Purcell Safe Company became and is entitled to the immediate possession of said personal property.

IV.

That on or about the ..... day of ....., 19...., said Purcell Safe Company deposited with and delivered said note evidencing said deferred payment secured by said conditional sale contract to the Seattle National Bank, a national banking corporation having its principal place of business at the City of Seattle, Washington, as collateral security for an indebtedness of said Purcell Safe Company to said bank. The said promissory note and conditional sale contract are the same note and contract mentioned in the certain amended answer of said Seattle National Bank filed herein; that said Purcell Safe Company has fully discharged its obligation to said Seattle National Bank, for which said promissory note and conditional sale contract were so deposited and delivered as col-

lateral security and is now the owner and holder of said promissory note and conditional sale contract.

V.

That said Purcell Safe Company has demanded of said S. C. Osborn, doing business as S. C. Osborn & Company, and said trustee the possession of said personal property, but they have refused and still refuse to deliver the same to said Purcell Safe Company without the authority and direction of this Court, and wrongfully retain possession thereof from the said Purcell Safe Company; that said personal property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of your petitioner; that said personal property, so held by said trustee in his possession as aforesaid, is of the actual value of the sum of Three Thousand Two Hundred Eighty-five and 9/100 ($3,285.09) Dollars.

WHEREFORE, your Petitioner prays that upon the hearing of this petition the Court order and direct said trustee herein to forthwith deliver possession of said personal property to said Purcell Safe Company.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for said petitioner.

United States of America,
Western District of Washington.—ss.

P. F. PURCELL, being first duly sworn, on oath deposes and says:

That he is the President of the Purcell Safe Company, the petitioner herein named; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

P. F. PURCELL.

Subscribed and sworn to before me this 6th day of May, A. D. 1911.

(Seal) H. J. RAMSEY,
Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A."

$3174. February 16, 1910.

One year after date, without grace, for value received, I promise to pay to the order of PURCELL SAFE CO. at Seattle, Wn., Thirty One Hundred and Seventy Four Dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent. per annum from Feb. 16, 1910, until paid. Interest to be paid semi annually and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay in addition to the costs and disbursements provided by statute Fifty Dollars in like Gold Coin for Attorney's Fees in said suit or action.

S. C. OSBORN CO.
S. C. OSBORN.

This Note is given in accordance with contract for Safe Deposit Boxes under date of Feb. 16, 1910.
No. Due Feb. 16, 1911.

Endorsed: Petition, Filed May 6th, 1911, 11 a. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.*	No. 4474. In Bankruptcy.

ANSWER OF TRUSTEE TO THE PETITION OF THE PURCELL SAFE COMPANY.

Comes now Nelson W. Parker, the Trustee herein, and for answer to the Petition by the Purcell Safe Company in the matter of the safe deposit boxes mentioned in said Petition and the Conditional Sale Contract claimed therein, does hereby put the said petitioner on proof as to all matters and things in said Petition set forth, and does in particular deny that the said petitioner has or had any Conditional Sale Contract whereby the title to the property mentioned in said Petition was or is reversed in the petitioner.

Dated at Seattle, in said District, this 3rd day of July, 1911.

McCLURE & McCLURE,
Attorneys for Trustee.

Endorsed: Answer of Trustee to Petition of Purcell Safe Company. Filed July 3rd, 1911, 2 p. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, *Bankrupt.* } No. 4474.

BE IT REMEMBERED, That on this 3d day of July, 1911, at the hour of 2:00 o'clock P. M., this cause came on for hearing before Hon. John P. Hoyt, Referee in Bankruptcy, at the Court Room in the Federal Building, Seattle, King County, Washington, upon the petition of the Purcell Safe Company for the return of goods, the Trustee in Bankruptcy appearing by McClure & McClure, his attorneys, and said Purcell Safe Company, appearing by Hughes, McMicken, Dovell & Ramsey, its attorneys, whereupon the following proceedings were had:

James Lynch, a witness produced on behalf of the Claimant, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION BY MR. RAMSEY.

Q Please state your name, age and residence, Mr. Lynch?

A James Lynch. Forty years. Seattle, King County, Washington.

Q Are you connected with the Purcell Safe Company which has filed a petition in this proceeding?

A I am.

Q How long have you been connected with that company and in what capacity?

A Five years and a half as sales manager.

Q The Purcell Safe Company has been a corporation during all of that time and is now a corporation?

A Yes.

Q Have its license fees to the State of Washington been paid?

A Yes.

Q What business has the Purcell Safe Company been engaged in during this period of time?

A The selling and installing of safes, vaults and fixtures; vault fixtures, construction of bank vaults.

Q I call your attention, Mr. Lynch, to a copy of a conditional sale contract dated February 16, 1910, purporting to have been made between S. C. Osborn and the Purcell Safe Company, such copy being certified by the Auditor of King County, Washington, and will ask you whether or not, on behalf of the Purcell Safe Company, you conducted the negotiations with S. C. Osborn respecting the sale, or respecting the subject of this contract concerning the 1020 safe deposit boxes described in the contract? Whether you conducted the negotiations?

A Yes, I conducted the sale.

Q Please state what the negotiations were, or dealings, leading up to the making of this contract between yourself in behalf of the Purcell Safe Company and Mr. Osborn?

A Previous to the making of this contract there had been a general contract between Mr. Osborn and our Company, conducted by myself, for the construction of a vault and equipping it with a fire-proof vault door and 1020 safe deposit boxes; the work for the construction of the vault and installation of the door had been completed some time before the boxes arrived; during the interim—

Q You mean the boxes described in this contract?

A Yes, the boxes described in this contract. During the interim between the completion of the vault and the arrival from our factory of these boxes, we decided that it would become necessary to have Mr. Osborn give us security in the shape of a conditional sale contract when the boxes did arrive, as he began to talk about paying for them on terms other than has been agreed on between us at first. When the boxes arrived in the city I took our form of contract to Mr. Osborn and asked him to sign it; he objected at first, and then, when

he found he could not get the boxes unless he did sign this contract, he signed it and asked that it be not recorded. I told him it was worthless unless it was recorded and we—

Q Well, I don't care for that. State whether or not this independent work and the furnishing of these 1020 boxes were all one contract, or were independent contracts?

A They were independent contracts, but the agreement to supply them was all one in the beginning; that is, his purchasing of the equipment was all one in the beginning.

Q What I mean is, was the price for them independent of each other?

A Entirely. Entirely.

Q Mr. Lynch, were you acquainted with this property described in the paper I have exhibited to you, 1020 safe deposit boxes?

A I was.

Q To whom did that property belong on the date of this agreement, February 16, 1910?

A To the Purcell Safe Company.

Q Now tell me whether on February 16, 1910, you arrived at any agreement with Mr. Osborn respecting these 1020 safe deposit boxes, and what you did with respect to evidencing that agreement in writing?

A We filled out this contract and had him to sign it, and we delivered him a copy—

Q Just a moment. First, what was the character of the paper in which you filled out the contract?

A It was our regular conditional sale contract form.

Q A regular printed conditional sale contract form?

A A regular printed conditional sale contract form.

Q Containing blanks to be filled out?

A Containing blanks to be filled out as to the article and terms of payment and amount.

Q What did you do then?

A We filled out the amounts and terms.

Q Who filled that out?

A I did personally, as shown by this contract here, this copy.

Q You filled out the amount and terms?

A The amount and terms.

Q Did you fill all the blanks?

A I filled all the blanks to complete the contract.

Q From examining this certified copy can you tell whether that is a copy of the contract with reference to which you are testifying now?

A This is.

Q Then what did you do?

A Delivered Mr. Osborn a copy and took the copy that he had signed.

Q Did you state whether this contract was signed by Mr. Osborn and whether it was signed by the Purcell Safe Company, and if not, state what the facts are in respect to that fact, before you delivered it?

A It was signed by Mr. Osborn and bore the signature of the Purcell Safe Company as it is shown on the contract.

Q What was the character of the signature on this contract for the Purcell Safe Company?

A It was the printed signature of the company.

Q I will ask you whether or not at that time you treated or adopted that signature there as the signature of the Purcell Safe Company?

THE COURT: I don't think that is a fair question. Let him state anything he did or anything he thought.

MR. RAMSEY: I didn't intend to ask an unfair question, your Honor.

THE COURT: That is a purely legal conclusion as to what he adopted. You may have him testify to anything he did.

Q Well, was there anything else you did with respect to this matter?

A Well, at the time of the transaction we delivered the boxes but we did not deliver them until Mr. Osborn had signed

the contract and we accepted part payment on the contract at the time.

Q Now I will ask you, Mr. Lynch, whether or not the Purcell Safe Company had any uniform custom or course which it regularly practiced with respect to the signing of conditional sale contracts which it entered into with vendees?

A Our uniform plan was to use the printed form of which this is a copy.

Q Printed form of what?

A Of conditional sale contract.

Q I mean with respect to the signature of the Purcell Safe Company?

A The printed form "Purcell Safe Company" at the bottom of the contract. No one was authorized or allowed to use any other form of signature or any other name except what was contained on that contract. They have done that ever since I have been with the company and several years previously.

Q Do you know of your own knowledge whether or not the officers of the company, in making conditional sale contracts, follow such a custom?

A Invariably. Never any other form used or any other custom.

Q At the time you say this was signed by Mr. Osborn and bore the signature of the Purcell Safe Company in the manner you have stated, was that paper thus executed in duplicate?

A It was.

Q One copy was delivered to Mr. Osborn and one retained by you in behalf of the Purcell Safe Company?

A Yes.

Q The two copies being originals?

A Yes.

Q I will ask you whether or not at that time, before the mutual delivery of these two originals between the Purcell Safe Company and S. C. Osborn, both of such originals bore

the signatures of S. C. Osborn and the signature of the Purcell Safe Company, as you have described the last signature?

A Both were identical.

Q But did they bear these signatures before the delivery of them?

A Certainly.

Q Now when was that contract made with reference to its date? It was dated February 16, 1910.

A It was made on that date.

Q Do you know what was the place of residence of Mr. Osborn at that time?

A Seattle.

Q In King County?

A King County.

Q I will ask you when these safe deposit boxes were delivered to Mr. Osborn and where they were delivered?

A We commenced delivering them this date at his vault on Third Avenue, in the building he was occupying—I don't recollect the number—it is shown on here, 507 Third Avenue; the delivery was begun that same day and continued through the next day, possibly.

Q Were they all delivered at the time of making this contract? one delivery?

A Yes. They were delivered from the depot to the vault.

Q The contract was filed in the Auditor's office, your copy, on the date shown, February 21, 1910, was it?

A Yes; it was sent to the office before that, but that's the date the receipt bore when it came to us.

Q Now, Mr. Lynch, at the time S. C. Osborn went into bankruptcy this property went into the possession of the Trustee in Bankruptcy, did it not?

A So I understand.

Q Mr. Lynch, I exhibit to you a paper purporting to be a promissory note dated February 16, 1910, for the sum of $3,174.00, payable one year after date, to the order of the Purcell Safe Company, executed by S. C. Osborn; do you know

whether that is the note executed by Mr. Osborn at the time of making this conditional sale contract?

A It was.

Q That is his signature upon the note?

A Yes.

By permission of the Court the note referred to was read into the record as follows:

"3285.09

111.09 51477 2/16/11

$3174. (June) (Protest) February 16, 1910.

One year after date, without grace, for value received I promise to pay to the order of Purcell Safe Co. at Seattle, Wn. Thirty One Hundred and Seventy four dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon, in like Gold Coin, at the rate of 7 per cent. per annum from Feb. 16, 1910 until paid. Interest to be paid semi-annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof I promise and agree to pay, in addition to the costs and disbursements provided by statute Fifty Dollars in like Gold Coin for Attorney's fees in said suit or action.

This note is given in accordance with contract for Safe Deposit Boxes under date Feb. 16, 1910.

No. .....

Due Feb. 16, 1911.

S. C. OSBORN CO.

S. C. OSBORN.

(Endorsed)

"S. C. Osborn

Purcell Safe Co.

Frank Purcell

Pres. & Treas.

1910
Novr. 28 Received interest from
Feby. 16, 1910, to Aug. 16, 1910, $111.09"

Q Mr. Lynch, this note secured by the conditional sale contract was at some time after the making of it turned into the Seattle National Bank, was it not?

A Yes.

Q Do you know what for?

A As collateral for a loan which was afterwards paid.

Q A loan to the Purcell Safe Company?

A A loan to the Purcell Safe Company.

Q Which was afterwards paid?

A Yes.

Q I will ask you to whom the note and conditional sale contract now belong?

A To the Purcell Safe Company.

Q What payments have been made upon the note?

A The amount shown on the back of the note, interest from February 16, 1910, to August 16, 1910, $111.09.

Q Has any further amount been paid on the note?

A No.

Q This note matured February 16, 1911?

A Yes, February 16, 1911.

MR. RAMSEY: I suppose it is not denied that we have asked the Trustee in Bankruptcy for, or demanded of the Trustee the possession of the property before bringing this petition?

MR. McCLURE: It is impossible to redeliver these boxes. The understanding is that the lien, if any, must be impressed upon the funds.

THE COURT: As to the fact that the Trustee became responsible for them, there is no question raised as to that.

MR. RAMSEY: There was default in the payment of the obligation, and if the conditional sale contract was good we would be entitled to possession.

Q The conditional sale agreement, Mr. Lynch, mentions the total consideration of $5,174.00, as the purchase price of these same deposit boxes; was part of that paid at the time of making the agreement, and, if so, how much?

A Part of that was paid as shown on the contract. Two thousand dollars cash was paid to me by check on that date.

Q February 16, 1910?

A February 16th and I had it cashed two hours afterwards.

MR. McCLURE: There is no dispute as to the amount?

MR. RAMSEY: No. That's all.

CROSS-EXAMINATION BY MR. McCLURE.

Q Is there anything in regard to that signature on this particular contract—

THE COURT: He testified, I think, to all that was done and he said it was in accordance with the universal custom of himself and other officers. "Other officers" is about all additional that has come into the case that I can see. That much it has been strengthened from what it was before.

Witness excused.

Testimony closed.

Indorsed: Transcript of Testimony taken in re claim of Purcell Safe Company for re-delivery of goods. Filed Aug. 12, 1911, 11:00 a. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

THE GENUINE HALL'S SAFE & LOCK CO.'S SAFES

Read this contract before signing.

PURCELL SAFE CO.

Seattle, Wash. Seattle, Wash., Feb. 16, 1910.

Please deliver the one group of 1020 Safe Deposit Boxes built for us and already in freight depot in Seattle marked to S. C. Osborn & Co., Town of Seattle, County of King, State of

Wash., via team from which we agree to pay to your order the sum of ($5,174.00) Five thousand one hundred & seventy-four dollars as follows:

$2,000.00 cash paid this day and a note for the balance $3,174.00 for 12 months from this date bearing interest at 7% per annum.

For safe delivery at 507 Third Ave., Seattle, Wash.

The undersigned agree to forward the cash payment, together with the notes above described, to you upon arrival of safe, failing in which, the whole amount shall become due and payable immediately. It is further agreed that the undersigned shall not permit the same to be removed from the place above mentioned, nor injured nor taken by any other person or process. And it is agreed that you do not part with, nor relinquish your claim on, or title to said safe until the cash or deferred payment or notes are fully paid, and in default of any or all of the payments for the safe or conditions as agreed you or your agent may, without process of law, take possession of and remove said safe, and retain any payments that may have been made on account of said safe, in lieu of the use of said safe, as rent or charges and damages on safe. ALL PAYMENTS TO BE MADE TO PURCELL SAFE CO., at the OFFICE OF THE COMPANY, SEATTLE, WASH. The undersigned agree to keep the above safe insured for its full value in a good company at its own expense, and in the event of a fire this contract shall be a lien upon said insurance policy for the amount that may at that time be due upon this contract. In the event of failure to make payments when due, interest at the rate of ten per cent. per annum shall be paid upon such deferred payments from the time when due until paid, and if for any cause PURCELL SAFE CO. shall bring suit to recover possession of said safe, in accordance with the terms of this contract, the undersigned agrees to pay attorney's fees and costs of Court. It is understood and agreed by the undersigned that all the conditions of the order are contained in the above, that no verbal statement or agreements with the

agent shall bind the PURCELL SAFE CO. to anything not written in the body of this order and that this order is not subject to be countermanded. S. C. OSBORN CO.
S. C. OSBORN.

Salesmen are not allowed to collect for us. Any payments made to them will be at your risk.

PURCELL SAFE CO.

State of Washington,
County of King.—ss.

I, Otto A. Case, Auditor of King County, State of Washington, and ex-officio Recorder of Deeds, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Conditional Sale.

The Genuine Hall's Safe & Lock Co.
Purcell Safe Co.
to
S. C. Osborne & Co.

as filed in this office in Records of King County.
(Seal)

Witness my hand and official seal this 12th day of May, 1911.

OTTO A. CASE,
Auditor of King County, Washington.
No. 8260 By C. F. Gage, Deputy.

Petitioners Exhibit "1." Filed at request of Vendor. Feb. 21, 1910, at 31 min. past 3 p. m. Records of King County, Wash. Otto A. Case, County Auditor. J. F. Lottsfeldt, Deputy. Fee 50 cts. Filed May 12, 1911. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

THE GENUINE HALL'S SAFE & LOCK CO.'S SAFES
Read this contract before signing.

PURCELL SAFE CO.

Seattle, Wash. Seattle, Wash., Feb. 16, 1910.

Please deliver the one group of 1020 Safe Deposit Boxes built for us and already in freight depot in Seattle marked to S. C.

Osborne & Co., Town of Seattle, County of King, State of Wash., via team from which we agree to pay to your order the sum of ($5,174.00) Five thousand one hundred & seventy-four dollars as follows:

$2,000.00 cash paid this day and a note for the balance $3,174.00 for 12 months from this date bearing interest at 7% per annum.

For safe delivery at 507 Third Ave., Seattle, Wash.

The undersigned agree to forward the cash payment, together with the notes above described, to you upon arrival of safe, failing in which, the whole amount shall become due and payable immediately. It is further agreed that the undersigned shall not permit the same to be removed from the place above mentioned, nor injured nor taken by any other person or process. And it is agreed that you do not part with, nor relinquish your claim on, or title to said safe until the cash or deferred payment or notes are fully paid, and in default of any or all of the payments for the safe or conditions as agreed you or your agent may, without process of law, take possession of and remove said safe, and retain any payments that may have been made on account of said safe, in lieu of the use of said safe, as rent or charges and damages on safe. ALL PAYMENTS TO BE MADE TO PURCELL SAFE CO., at the OFFICE OF THE COMPANY, SEATTLE, WASH. The undersigned agree to keep the above safe insured for its full value in a good company at its own expense, and in the event of a fire this contract shall be a lien upon said insurance policy for the amount that may at that time be due upon this contract. In the event of failure to make payments when due, interest at the rate of ten per cent. per annum shall be paid upon such deferred payments from the time when due until paid, and if for any cause PURCELL SAFE CO. shall bring suit to recover possession of said safe, in accordance with the terms of this contract, the undersigned agrees to pay attorney's fees and costs of Court. It is understood and agreed by the undersigned that all the conditions of the order are con-

tained in the above, that no verbal statement or agreements with the agent shall bind the PURCELL SAFE CO. to anything not written in the body of this order and that this order is not subject to be countermanded.

S. C. OSBORN CO.
S. C. OSBORN.

Salesmen are not allowed to collect for us. Any payments made to them will be at your risk.

PURCELL SAFE CO.

State of Washington,
County of King.

I, Otto A. Case, Auditor of King County, State of Washington, and ex-officio Recorder of Deeds, in and for said County, do hereby certify the above and foregoing to be a true and correct copy of a Conditional Sale.

Purcell Safe Co.
to
S. C. Osborne

as filed in this office of King County.

(Seal)

Witness my hand and official seal this 5th day of Aug. 1911.

OTTO A. CASE,
Auditor of King County, Washington.
By W. W. Castle, Deputy.

No. 8403

Petitioner's Exhibit "1-A." Filed at request of Vendor. Feb. 21, 1910, at 31 min. past 3 p. m. Records of King County, Wash. Otto A. Case, County Auditor. J. F. Lottsfeldt, Deputy. Fee 50 cts. Filed Aug. 7, 1911, 9:00 a. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN doing business as S. C. OSBORN & CO., *Bankrupt.*	No. 4474. In Bankruptcy.

ORDER OF REFEREE DENYING PETITION OF PURCELL SAFE COMPANY IN RE CLAIMED CONDITIONAL SALE CONTRACT.

This cause having heretofore come on for hearing on the petition of the Purcell Safe Company, a corporation, that a certain group of 1020 Safe Deposit Boxes delivered by the petitioner to the bankrupt on or about the 16th day of February, 1910, and installed in those certain premises known as No. 507 Third Avenue, Seattle, King County, Washington, be adjudged the property of the petitioner pursuant to a certain purported Conditional Sale Contract claimed to have been entered into by the petitioner with the bankrupt on said February 16th, 1910, in and by virtue of which the petitioner claims that it agreed to sell and deliver to the bankrupt at Seattle, Washington, the said Safe Deposit Boxes for the sum of $5174.00 of which sum $2000.00 was on said February 16th, 1910, paid in cash, and the balance was to be paid in twelve months after said February 16th, 1910, with interest at seven per cent. per annum and was evidenced by a promissory note of said bankrupt made and delivered simultaneously with said contract, which said contract was claimed by the petitioner to have been filed in the office of the County Auditor of King County, Washington, on February 21st, 1910, the petitioner appearing by Hughes, McMicken, Dovell & Ramsay, its attorneys, and the trustee appearing in person and by McClure &

McClure, his attorneys, and it having been then and there by the said parties respectively agreed in open court that the validity of said alleged conditional sale contract be submitted to the court for its determination, and that in case said contract should be held by the court to reserve in the petitioner the title to the property therein described, the petitioner should be entitled to have and receive payment in cash for its said claim instead of the possession of the property in said contract described, the said agreement being made by petitioner expressly upon condition that sufficient funds be retained by the trustee pending final determination herein, or on review, for full payment thereof, and that in case the said conditional sale contract should be by the court held and adjudged to be invalid and said sale should be held to be absolute, the petitioner should be allowed to prove its claim upon said note in the customary form, and according to the rules;

And James Lynch, one of the officers of the petitioner, having been duly called and sworn, and having testified as a witness in behalf of the petitioner, and certified copies of said alleged conditional sale contract having been offered and received in evidence, and the court having considered the evidence and the argument of counsel thereon, being fully advised, it appearing to the court that the original contract was not signed by the petitioner as required by the laws of the State of Washington, and that the sale of the property mentioned in said contract to the bankrupt was and is an absolute and unconditional sale, to which findings petitioner excepts;

It is by the court adjudged and decreed:

1. That said petition of said Purcell Safe Company for the return of the property in said contract described be and the same is hereby denied, to which petitioner excepts.

2. That the said contract claimed by said petitioner as a conditional sale contract be and the same is hereby adjudged and decreed to be invalid and of no force or effect, to which petitioner excepts.

3. That the sale made by the petitioner, the Purcell Safe

Company, to the bankrupt, of the property described in said contract, was and is an unconditional and absolute sale thereof, to which petitioner excepts.

4. That the claim of the said Purcell Safe Company upon the said promissory note for $3174.00, with interest thereon at the rate of seven per cent. per annum from August 16th, 1910, to December 28th, 1910, (the same being the date of the adjudication of bankruptcy herein), amounting in all to the sum of $3255.46, be, and the same is hereby allowed as a general unsecured claim, without petitioner being required to file further or other proof of debt herein, and without prejudice to petitioner's right to review this order denying its said petition, subject to such exceptions or objections as may hereafter be filed.

Dated at Seattle, in said district, this 11th day of August, 1911.

JOHN P. HOYT, Referee.

Endorsed: Order of Referee denying petition of Purcell Safe Company in re claimed Conditional Sale Contract. Filed Aug. 11th, 1911, 3 p. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORNE, doing business as S. C. OSBORNE COMPANY, *Bankrupt.*	No. 4474. In Bankruptcy.

PETITION OF PURCELL SAFE COMPANY FOR A REVIEW OF THE ORDER IN RE CONDITIONAL SALE CONTRACT

To the Honorable John P. Hoyt, Referee in Bankruptcy:

Comes now the Purcell Safe Company, a corporation, and respectfully shows:

I.

That heretofore it made and filed herein its petition claiming the return to it of certain safe deposit boxes heretofore delivered by it to the above named bank; that on the 11th day of August, 1911, an order, a copy of which is hereto annexed, was made and entered herein in the matter of said petition to which order the petitioner Purcell Safe Company duly excepted.

II.

That said order was and is erroneous in the following particulars:

(a) In finding that the conditional sale contract mentioned in the petition of said Purcell Safe Company was not signed by it as required by the laws of the State of Washington.

(b) In finding that the sale of the property mentioned in said contract to the bankrupt was and is an absolute and unconditional sale.

(c) In adjudging that said petition of the Purcell Safe Company for the return of said property be denied.

(d) In adjudging that said conditional sale contract is invalid and of no force or effect.

(e) In adjudging that the sale by said Purcell Safe Company to said bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

(f) That said order is contrary to law and is not supported by the proof at the hearing of said petition.

WHEREFORE your petitioner feeling aggrieved because of said order prays that the same may be reviewed and reversed as provided in the bankruptcy act of 1898 and the general order XXVII.

Dated at Seattle in said District, this 11th day of August, A. D. 1911.

PURCELL SAFE COMPANY,
Petitioner.

By Hughes, McMicken, Dovell & Ramsey,
Its Attorneys.

COPY

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.*	No. 4474. In Bankruptcy.

ORDER OF REFEREE DENYING PETITION OF PURCELL SAFE COMPANY IN RE CLAIMED CONDITIONAL SALE CONTRACT.

This cause having heretofore come on for hearing on the petition of the Purcell Safe Company, a corporation, that a certain group of 1020 Safe Deposit Boxes delivered by the petitioner to the bankrupt on or about the 16th day of February, 1910, and installed in those certain premises known as No. 507 Third Avenue, Seattle, King County, Washington, be adjudged the property of the petitioner pursuant to a certain purported conditional sale contract claimed to have been entered into by the petitioner with the bankrupt on said February 16th, 1910, in and by virtue of which the petitioner claims that it agreed to sell and deliver to the bankrupt at Seattle, Washington, the said Safe Deposit Boxes for the sum of $5174.00 of which sum $2000.00 was on said February 16th, 1910, paid in cash, and the balance was to be paid in twelve months after said February 16th, 1910, with interest at seven per cent. per annum and was evidenced by a promissory note of said bankrupt made and delivered simultaneously with said contract, which contract was claimed by the petitioner to have been filed in the office of the County Auditor of King County, Washington, on February 21st, 1910, the petitioner appearing by Hughes, McMicken, Dovell & Ramsey, its attorneys, and the trustee appearing in person and by McClure & McClure, his attorneys, and it having been then and there by the said parties respectively agreed in open court that the

validity of said alleged conditional sale contract be submitted to the court for its determination, and that in case said contract should be held by the court to reserve in the petitioner the title to the property therein described, the petitioner should be entitled to have and receive payment in cash for its said claim instead of the possession of the property in said contract described, the said agreement being made by petitioner expressly upon condition that sufficient funds be retained by the trustee pending final determination herein, or on review, for full payment thereof, and that in case the said conditional sale contract should be by the court held and adjudged to be invalid and said sale should be held to be absolute, the petitioner should be allowed to prove its claim upon said note in the customary form, and according to the rules;

And James Lynch, one of the officers of the petitioner, having been duly called and sworn, and having testified as a witness in behalf of the petitioner, and certified copies of said alleged conditional sale contract having been offered and received in evidence, and the court having considered the evidence and the argument of counsel thereon, being fully advised, it appearing to the court that the original contract was not signed by the petitioner as required by the laws of the State of Washington, and that the sale of the property mentioned in said contract to the bankrupt was and is an absolute and unconditional sale, to which findings petitioner excepts;

It is by the court adjudged and decreed:

1. That said petition of said Purcell Safe Company for the return of the property in said contract described be and the same is hereby denied, to which petitioner excepts.

2. That the said contract claimed by said petitioner as a conditional sale contract be and the same is hereby adjudged and decreed to be invalid and of no force or effect, to which petitioner excepts.

3. That the sale made by the petitioner, the Purcell Safe Company, to the bankrupt, of the property described in said

contract, was and is an unconditional and absolute sale thereof, to which petitioner excepts.

4. That the claim of the said Purcell Safe Company upon the said promissory note for $3174.00 with interest thereon at the rate of seven per cent. per annum from August 16th, 1910, to December 28th, 1910, (the same being the date of the adjudication of bankruptcy herein), amounting in all to the sum of $3255.46, be, and the same is hereby allowed as a general unsecured claim, without petitioner being required to file further or other proof of debt herein, and without prejudice to petitioner's rights to review this order denying its said petition, subject to such exceptions or objections as may hereafter be filed.

Dated at Seattle, in said District, this 11th day of August, 1911.

JOHN P. HOYT, Referee.

Copy of within ..... received, and due service of same acknowledged this 12th day of August, 1911.

McCLURE & McCLURE,
Attys. for Trustee.

Endorsed: Petition of Purcell Safe Company for review of the Order in re Conditional Sale Contract. Filed Aug. 12th, 1911, 11 a. m. John P. Hoyt, Referee. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States, for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & Co., Bankrupt.	No. 4474. In Bankruptcy.

A petition for the review of the Order made and filed herein on the 11th day of August, 1911, denying the Petition of the Purcell Safe Company, having been filed by and on behalf of said Purcell Safe Company, the undersigned, the Referee in Bankruptcy before whom said matter is pending, and who made said order, certifies and returns as follows, to-wit:

That said order was made after the introduction of proofs at a hearing regularly had for that purpose; that as a part of such proofs there was introduced certified copies of the alleged Conditional Contract of Sale, one of which was in such form that it was practically a fac simile of the original Contract so far as its form and the manner of its signing and the relation of the names of the respective parties thereto was concerned, and said undersigned was of the opinion that the printed signature "Purcell Safe Company," placed in the margin of said Contract, did not in itself show any signing of said Contract on the part of said Purcell Safe Company, the petitioning corporation, and the proof offered on the part of said Purcell Safe Company, by which it was sought to show that such printed name on the blank was a sufficient signature, did not in his opinion establish such fact. For that reason said undersigned was of the opinion and held that the alleged Conditional Sale Contract had never been signed by the said Purcell Safe Company, a corporation, and for that reason was invalid as such so far as creditors of the bankrupt were concerned.

He, therefore, returns with this Certificate the original

petition of said Purcell Safe Company, the Answer of the Trustee thereto, said exhibits introduced upon the hearing, together with a transcript of the evidence taken on behalf of the claimant at such hearing, said Order of August 11th, 1911, and said Petition for Review, as constituting together a sufficient Certificate and Return to enable a Judge of the above named Court to review said Order.

All of which is respectfully submitted.

Dated at Seattle, in said District, this 14th day of August, 1911.

JOHN P. HOYT, Referee in Bankruptcy.

Endorsed: Certificate and Return. Filed in the U. S. District Court, Western Dist. of Washington. August 14, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN COMPANY, *Bankrupt.*	No. 4474. In Bankruptcy.

MEMORANDUM DECISION ON CLAIM OF PURCELL SAFE COMPANY.

This case comes for review of a decision and order of the Referee denying the validity of an alleged Conditional Sale Contract pursuant to which the bankrupt received 1020 Safe Deposit Boxes, theretofore owned by the Purcell Safe Company, a Corporation.

By the terms of a Statute of this state, to give such a contract force and validity against bona fide creditors of the

vendee in possession of the property sold conditionally, it is essential that a memorandum of the agreement be signed by the vendor and the vendee. Pierce's Code 1905 Sec. 6547.

The evidence proves that part of the purchase price for the safe deposit boxes remains unpaid; that the Purcell Safe Company furnishes its agents printed blanks for such contracts, each of which has at the bottom its name "Purcell Safe Co." printed; and that the contract in question was not signed by the vendor otherwise than by adoption by its officers of the printed name as its signature and by the use of said blanks in making said agreement and the signing thereof in duplicate by the vendee.

I do not mean to decide that a corporation may not by a resolution of its board of directors adopt a signature made by type and a printing press for authenticating its contracts; nor that the long continued practice of its officers in issuing contracts so authenticated may not estop it from repudiating obligations assumed in that manner, but I do concur with the Referee in holding that the custom as proved does not meet the plain requirement of, and cannot override, the statute.

The decision and order of the referee is confirmed.

C. H. HANFORD, Judge.

Indorsed: Memorandum Decision on Claim of Purcell Safe Company. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 24, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & Co., *Bankrupt.*	No. 4474. In Bankruptcy.

ORDER CONFIRMING DECISION AND ORDER OF REFEREE DENYING PETITION OF PURCELL SAFE COMPANY IN RE CLAIMED CONDITIONAL SALE CONTRACT.

This cause having heretofore been heard on review of the decision and order of John P. Hoyt, Referee, in the matter of the petition of the Purcell Safe Company, a corporation, that a certain group of 1020 Safe Deposit Boxes be adjudged the property of said petitioner pursuant to a certain purported conditional sale contract, the petitioner appearing by its attorneys and the trustee appearing by his attorneys, and said matter having been argued and submitted to the court, and the court being fully advised in the premises, it is by the Court, adjudged and decreed:

1. That the decision and order of the Referee be, and the same is hereby confirmed, to which said petitioner excepts.

2. That said petition of said Purcell Safe Company for the return of the property in said contract described, be, and the same is hereby denied, to which petitioner excepts.

3. That the said contract claimed by said petitioner as a conditional sale contract be, and the same is hereby adjudged and decreed to be invalid and of no force or effect, to which petitioner excepts.

4. That the sale made by the petitioner, the Purcell Safe Company, to the bankrupt, of the property described in said

contract, was and is an unconditional and absolute sale thereof, to which petitioner excepts.

5. That the claim of the said Purcell Safe Company upon the said promissory note for $3174.00, with interest thereon at the rate of seven per cent. per annum from August 16th, 1910, to December 28th, 1910, (the same being the date of the adjudication of bankruptcy herein), amounting in all to the sum of $3255.46, be, and the same is hereby allowed as a general unsecured claim, without petitioner being required to file further or other proof of debt herein, and without prejudice to petitioner's right to review this order denying its said petition, subject to such exceptions or objections as may hereafter be filed.

Dated at Seattle, in said District, this 25th day of August, 1911.

C. H. HANFORD, Judge.

Service of within Order and receipt of copy admitted this 25th day of August, 1911.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Purcell Safe Co.

Endorsed: Order confirming decision and order of Referee denying petition of Purcell Safe Company in re claimed conditional sale contract. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 25, 1911. F. A. Simpkins, Acting Clerk, U. S. Dist. Court, Western Dist. of Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.* PURCELL SAFE COMPANY, a corporation, *Petitioner.*	No. 4474.

PETITION FOR APPEAL.

To the Honorable C. H. Hanford, District Judge, and one of the Judges of the above named Court presiding therein:

The above named petitioner in the above entitled matter feeling itself aggrieved by the order and decree made and entered by the above named Court in the above entitled matter, under date of August 25, 1911, wherein and whereby, among other things, it was and is ordered and decreed that the order of Honorable John P. Hoyt, Referee, denying the petition of the Purcell Safe Company in the above entitled matter be confirmed, that the contract claimed by said Purcell Safe Company as a conditional sale contract is invalid and of no force or effect; that the sale made by said petitioner, Purcell Safe Company, to the bankrupt of the property described in said contract is an unconditional and absolute sale thereof, and that the petition of said Purcell Safe Company, for the return of the property in said contract described, be denied, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree, and particularly from the part thereof above specified, for the reasons set forth in the assignment of errors which is filed herewith, and the said petitioner prays that this its petition for

its said appeal may be allowed; that citation issue to the duly appointed and acting trustee of the estate of said bankrupt, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 30th day of September, A. D. 1911.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Solicitors for Petitioner.

The foregoing claim of appeal is allowed.

Dated this 30th day of September, A. D. 1911.

C. H. HANFORD,
United States District Judge, Presiding in the above named Court.

Service of the within paper, petition for appeal and order allowing the same, on the undersigned, this 30th day of September, A. D. 1911, is hereby admitted.

McCLURE & McCLURE,
Solicitors for Nelson W. Parker, Trustee in the Matter of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt.

Indorsed: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,
Bankrupt.
No. 4474.

ASSIGNMENT OF ERRORS

Comes now the petitioner, Purcell Safe Company, and files the following assignment of errors, upon which it will rely on its appeal from the order and decree made by this Honorable Court on the 25th day of August, 1911, in the above entitled matter:

I.

The United States District Court in and for the Western District of Washington, Honorable C. H. Hanford, Presiding, erred in confirming the decision and order of Honorable John P. Hoyt, Referee, in the matter of the petition of the Purcell Safe Company that a certain group of 1020 Safe Deposit Boxes be adjudged the property of said petitioner, pursuant to a certain conditional sale contract between said petitioner and the said bankrupt.

II.

The said Court erred in adjudging and decreeing that said contract claimed by said petitioner to be a conditional sale contract was invalid and of no force or effect as a conditional sale contract.

III.

The said Court erred in adjudging and decreeing that the sale made by the petitioner, the Purcell Safe Company, to the

bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

IV.

The said Court erred in adjudging and decreeing that the said petition of said Purcell Safe Company, for the return of the property in said contract described, be denied and in denying the same.

Wherefore, the petitioner prays that the said decree of said Court be reversed and the said Court be directed to enter a decree ordering the return of said property to this petitioner.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Solicitors for Purcell Safe Company.

Copy of within Assignment of Errors received, and due service of same acknowledged this 30th day of September, 1911.

McCLURE & McCLURE,
Solicitors for Nelson W. Parker, as Trustee, etc.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Petitioner.

No. 4474.

ORDER FIXING AMOUNT OF COST BOND

This cause coming on for hearing upon the application of petitioner, Purcell Safe Company, to have the Court fix the amount of the cost bond, and the Court being duly advised in the premises:

It is hereby ordered and decreed that the amount of the cost bond of petitioner on appeal herein be and is hereby fixed at the sum of Five hundred dollars.

Done in open Court this 30th day of September, A. D. 1911.

C. H. HANFORD,
United States District Judge, Presiding in above named Court.

Service of copy of the foregoing order is hereby admitted this 30th day of September, A. D. 1911.

McCLURE & McCLURE,
Solicitors for Nelson W Parker, as Trustee in above entitled matter.

Indorsed: Order Fixing Amount of Cost Bond. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.* PURCELL SAFE COMPANY, a corporation, *Petitioner.*	No. 4474.

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That we Purcell Safe Company, a corporation, as Principal, and The United States Fidelity & Guaranty Company, a body corporate, duly incorporated under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety are held and firmly bound unto Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, and his successors, in the sum of Five hundred dollars, for the payment of which sum well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of September, A. D. 1911.

The condition of this obligation is such that

Whereas, in the above entitled Court and proceeding an order and decree was entered on the 25th day of August, 1911, wherein and whereby, among other things, it was and is ordered and decreed that the order of Honorable John P. Hoyt, Referee, denying the petition of the Purcell Safe Company in the above entitled matter be confirmed, that the contract claimed by said Purcell Safe Company as a conditional sale contract is invalid and of no force or effect; that the sale made by the

petitioner, Purcell Safe Company, to the bankrupt of the property described in said contract is an unconditional and absolute sale thereof, and that the petition of said Purcell Safe Company, for the return of the property in said contract described, be denied; and the said Purcell Safe Company, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and a citation directed to the said Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, is about to be issued, citing and admonishing him to be and appear at an United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California;

Now, therefore, the condition of the above obligation is such that if the said Purcell Safe Company shall prosecute its said appeal to effect and answer all costs that may be awarded against it, if it fail to make its plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

PURCELL SAFE COMPANY,
By Hughes, McMicken, Dovell & Ramsey,
Its Attorneys herein.

THE UNITED STATES FIDELITY & GUARANTY CO.,
(Seal) By Henry McClure and J. A. Cathcart,
Its Attorneys in fact.

The foregoing bond is hereby approved September 30, 1911.
C. H. HANFORD, Judge.

Copy of within bond received, and due service of same acknowledged this 30th day of September, 1911.

McCLURE & McCLURE,
Solicitors for Nelson W. Parker, as Trustee, etc.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Petitioner and Appellant.

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

No. 4474.

ORDER TO TRANSMIT ORIGINAL EXHIBIT

Now on the 5th day of October, 1911, upon motion of Messrs. Hughes, McMicken, Dovell & Ramsey, and for sufficient cause appearing, it is ordered that the Petitioner's original Exhibit "1-A" filed and introduced as evidence upon the trial of this cause, be by the Clerk of this Court forwarded to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there to be inspected and considered together with the transcript of the record on appeal in this cause.

C. H. HANFORD, Judge.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Petitioner and Appellant.

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

No. 4474.

LODGED COPY

CITATION ON APPEAL

United States of America.—ss.

The President of the United States to Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt. GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Purcell Safe Company, a corporation, is appellant, and you, the said Nelson W. Parker as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, are appellee, to show

cause, if any there be why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable C. H. Hanford, Judge of said District Court, this 30th day of September, 1911, and of the independence of the United States the one hundred and thirty-sixth year.

C. H. HANFORD,
Judge of the United States District Court for the Western District of Washington.

Attest: F. A. Simpkins, Acting Clerk of the United States
(Seal) District Court for the Western District of Washington.

Indorsed: Lodged Copy. No. 4474. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt. Purcell Safe Company, a corporation, Petitioner and Appellant, vs. Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, Appellee. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk. Otto B. Rupp, Hughes, McMicken, Dovell & Ramsey, Attorneys for Petitioner, 661-670 Colman Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Petitioner and Appellant.

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

No. 4474.

CITATION ON APPEAL

United States of America.—ss.

The President of the United States to Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt. GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Purcell Safe Company, a corporation, is appellant, and you, the said Nelson W. Parker as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, are appellee, to show

cause, if any there be why the decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable C. H. Hanford, Judge of said District Court, this 30th day of September, 1911, and of the independence of the United States the one hundred and thirty-sixth year.

C. H. HANFORD,
Judge of the United States District Court for the Western District of Washington.

Attest: F. A. Simpkins, Acting Clerk of the United States
(Seal) District Court for the Western District of Washington.

Service of the foregoing Citation upon said Appellee this 30th day of September, A. D. 1911, is hereby acknowledged.

McCLURE & McCLURE,
Solicitors for said Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, Appellee.

Received copy of the foregoing Citation lodged with me for Appellee this 30th day of September, 1911.

F. A. SIMPKINS,
Acting Clerk of said Court.

Indorsed: Original. No. 4474. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt. Purcell Safe Company, a corporation, Petitioner and Appellant, vs. Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, Appellee. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sep. 30, 1911. F. A. Simpkins, Acting Clerk. Otto B. Rupp, Hughes, McMicken, Dovell & Ramsey, Attorneys for Petitioner, 661-670 Colman Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Petitioner and Appellant.

vs.

NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

No. 4474.

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that the Clerk of said court in preparing and certifying to the United States Circuit Court of Appeals the record herein on the appeal of said Purcell Safe Company, shall include therein transcript of the following papers and proceedings, and none other, which papers and proceedings contain a full and complete record in said cause of all that is necessary to the determination of the matters involved in said appeal and embody all of the testimony offered and introduced with reference to said matters, and that the same shall be so certified by the Clerk of said court, viz:

1. Petition of Purcell Safe Company, filed with the referee May 6, 1911.
2. Answer of trustee, filed with referee July 3, 1911.
3. Transcript of testimony taken before referee July 3, 1911.

4. Certified copy of conditional sale agreement, filed with referee, May 12, 1911.

5. Printed certified copy of conditional sale contract filed with referee August 7, 1911.

6. Order of referee denying petition of Purcell Safe Company, dated August 11, 1911.

7. Petition of Purcell Safe Company for review of referee's order, filed with referee August 12, 1911.

8. Certificate and return of referee, filed August 14, 1911.

9. Opinion, filed August 24, 1911.

10. Order confirming decision of order of referee, filed August 25, 1911.

11. Petition for appeal and allowance of same, filed September 30, 1911.

12. Assignment of errors, filed September 30, 1911.

13. Order fixing amount of bond, filed September 30, 1911.

14. Bond on appeal, filed September 30, 1911.

15. Citation on appeal (original) filed September 30, 1911.

16. Citation on appeal (copy) lodged with Clerk, September 30, 1911.

IT IS FURTHER STIPULATED that the original of said certified copy of conditional sale contract filed with the referee August 7, 1911, shall be transmitted by the Clerk of said court with the record herein to the Circuit Court of Appeals.

Dated Oct. 2, 1911.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Petitioner.

McCLURE & McCLURE,
Attorneys for Nelson W. Parker, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, Appellee.

Indorsed: Stipulation. Filed in the U. S. District Court, Western District of Washington, Oct. 4, 1911. A. W. Engle, Clerk. F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.* PURCELL SAFE COMPANY, a corporation, *Petitioner and Appellant.* vs. NELSON W. PARKER, as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, *Appellee.*	No. 4474.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Western District of Washington.—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 49 printed pages, numbered from 1 to 49, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the Stipulation of the Attorneys for Petitioner and Appellant as the same remain of record and on file in the office of the Clerk of the said Court, save and excepting Petitioner's Exhibit "1-A" separately certified of even date herewith, and transmitted to the Circuit Court of Appeals, there to be inspected and considered, together with the record upon appeal in this cause—said Exhibit being transmitted pursuant to the Order of the District Court made in the said cause October 5,

1911, a copy of which order will be found on Page 41 of said record, and that the same constitutes the record on appeal from the Order, Judgment and Decree of the District Court of the United States, for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit in said cause.

I further certify that I hereunto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript of the record on appeal is the sum of $92.00 and that the said sum has been paid to me by Messrs. Hughes, McMicken, Dovell & Ramsey, of counsel for Petitioner and Appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 13th day of October, 1911.

(Seal) A. W. ENGLE, Clerk.

No. 2055

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Appellant,

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLANT

HUGHES, McMICKEN, DOVELL & RAMSEY,
OTTO B. RUPP,

Attorneys for Appellant.

Lowman & Hanford Co., Seattle, Wash.

No.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,

Bankrupt.

PURCELL SAFE COMPANY, a corporation,

Appellant,

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

S. C. Osborn, doing business as S. C. Osborn & Company, at Seattle, Washington, was adjudicated

a bankrupt and Nelson W. Parker, the appellee, was duly appointed trustee of the bankrupt estate by decree of the District Court entered December 28, 1910. Said trustee duly qualified as such, and took possession of the said estate including a group of one thousand and twenty safe deposit boxes which the appellant built for the said bankrupt and installed at the latter's place of business on and prior to February 16, 1910. The appellant, on May 6, 1911, presented to the Hon. John P. Hoyt, referee in bankruptcy, to whom the case had been referred by the District Court, a petition, alleging among other things, that the said deposit boxes had been sold and delivered by the petitioner to the said bankrupt pursuant to a conditional sale contract, in writing, entered into between said petitioner and the said S. C. Osborn, doing business as S. C. Osborn & Company, on the 16th day of February, 1910; that the agreed price for said boxes was $5,174.00, of which $2,000 was paid in cash on said date; that the balance was to be paid in twelve months from said date with interest at 7% per annum, and was evidenced by the promissory note of said S. C. Osborn, doing business as S. C. Osborn & Company, made and delivered simultaneously with the making of said conditional contract; that in said contract it was agreed, among other things, that the said Purcell Safe Company did not part with or relinquish its title to the said personal property until the said note should be fully paid, and that in default of payment of said note, said Purcell Safe Company might

take possession of and remove said personal property; that the said contract was duly filed in the office of the auditor of King County, Washington, on the 21st day of February, 1910; that on the 16th day of February, 1911, the sum of $3,174.00 and interest since February 16, 1910, at the rate of 7% per annum, became due and payable to said Purcell Safe Company from said S. C. Osborn & Company by virtue of the terms of said contract; that said sum and interest had not been paid nor any part thereof, except the interest thereon to August 16, 1910, and that by reason of the default in said payment said Purcell Safe Company became, and is, entitled to the immediate possession of said personal property. The said petition further alleged that the petitioner had demanded of said S. C. Osborn, doing business as S. C. Osborn & Company, and of said trustee, the possession of the said property, but they had refused to deliver the same to said Purcell Safe Company without the order of the Court, and concluded with the prayer that upon hearing the Court order and direct the said trustee to forthwith deliver possession of said personal property to said Purcell Safe Company. The trustee by his answer to said petition "put the said petitioner on proof as to all matters and things in said petition set forth" and in particular denied that the petitioner had any conditional sale contract whereby the title to the property mentioned in said petition was reserved in the petitioner. From the testimony taken in support of the said petition and the exhibits introduced in evidence, the

referee found that the instrument relied upon as constituting a conditional sale contract was in the form of an order directed to the Purcell Safe Company, signed by S. C. Osborn Company and S. C. Osborn, and written upon the stationery of the said Purcell Safe Company, a corporation, which said stationery had printed thereon at the bottom below where the order was signed by the said S. C. Osborn the words "Purcell Safe Co."; that this order was filled out by an agent of said Purcell Safe Company signed by the said Osborn in his presence and delivered by him in the ordinary course of business and that in pursuance thereof the property described therein was delivered to the said S. C. Osborn and thereafter and within the time provided by law, the said instrument was duly recorded in the auditor's office of the proper county. From these facts the referee concluded that the sale became absolute, notwithstanding the recording of the order, being of the opinion that the contract was not signed by the vendor within the meaning of the statute of the State of Washington, relating to conditional sales, which is as follows:

"All conditional sales of personal property or leases thereof containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions *and signed by the vendor and vendee,* shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking

possession of the property, the vendee resides." (Italics ours.)

Pierce's Washington Code (Ed. 1905), Sec. 6547.

2 Rem. & Bal. Annotated Codes and Statutes of Washington, Sec. 3670.

The appellant, in due time, filed a petition for review of the order of the referee entered in accordance with his findings and conclusion as above set forth, in which petition the appellant states that the order of the referee was and is erroneous in the following particulars:

"(a) In finding that the conditional sale contract mentioned in the petition of said Purcell Safe Company was not signed by it as required by the laws of the State of Washington.

(b) In finding that the sale of the property mentioned in said contract to the bankrupt was and is an absolute and unconditional sale.

(c) In adjudging that said petition of the Purcell Safe Company for the return of said property be denied.

(d) In adjudging that the said conditional sale contract is invalid and of no force or effect.

(e) In adjudging that the sale of said Purcell Safe Company to said bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

(f) That said order is contrary to law and is not supported by the proof at the hearing of said petition." (Record, pp. 24, 25.)

Thereupon the referee transmitted to the District Court his certificate as required by law and with it

the original petition of said Purcell Safe Company, the answer of the trustee thereto, the exhibits introduced upon the hearing, together with a transcript of the evidence in such hearing, the order made upon such hearing and the said petition for review.

On the 25th day of August, 1911, the District Court, Hon. C. H. Hanford presiding, made and entered an order adjudging and decreeing (1) that the decision and order of the referee be confirmed; (2) that the petition of the said Purcell Safe Company for the return of the property described in the contract referred to in said petition be denied; (3) that the said contract claimed by said petitioner as conditional sale contract be adjudged and decreed to be invalid and of no force or effect; (4) that the sale made by the petitioner, the Purcell Safe Company to the bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof. (Record p. 32.)

The appellant duly excepted to said order and every part thereof, wherein the same is deemed erroneous. Its petition for appeal to this Court was duly allowed and its appeal perfected on the 30th of September, 1911.

SPECIFICATION OF ERRORS.

I.

The United States District Court in and for the Western District of Washington, Honorable C. H.

Hanford presiding, erred in adjudging and decreeing that the contract claimed by appellant to be a conditional sale contract was and is invalid and of no force or effect.

II.

The said Court erred in adjudging and decreeing that the sale made by the appellant to the bankrupt of the property described in said contract was and is an unconditional and absolute sale thereof.

III.

The said Court erred in adjudging and decreeing that the petition of the appellant for the return of the property described in said contract be denied and is denying the same.

IV.

The said Court erred in confirming the decision and order of the referee.

BRIEF OF THE ARGUMENT.

The only question presented by the foregoing specification of errors is whether or not the instrument in writing, signed by the bankrupt on February 16, 1910, and by him delivered to appellant and claimed by the appellant to be a conditional contract of sale, was and is a valid conditional sale contract under the laws of Washington. If that question is answered in the affirmative, all of appellant's assign-

ment of error must be sustained. The answer to that question depends simply and only upon the answer to another question, which is: Was the said instrument "signed" by the vendor as required by the Washington statute? The order of the referee, his certificate and return and the memorandum opinion of the District Court, all show that the instrument relied upon by the appellant as constituting a conditional sale contract was held to be invalid and of no force and effect as a conditional sale contract, for the sole reason that in the opinion of the referee and of the Court the said instrument was not *signed* by the appellant within the meaning of the statute of the State of Washington relating to conditional sales.

The statute in question has already been quoted in full in this brief. It requires that the memorandum of the sale be "signed by the vendor and vendee." Was the instrument appellant relies upon "signed by the vendor"? A copy and a fac-simile of said instrument were introduced in evidence and filed before the referee and transmitted by him to the District Court, and by stipulation of the parties to this controversy the original instrument has been taken from the files of the office of the Auditor of King County and inserted in the record of this case (Record, pp. 18-20, 47). The Court will notice that the said instrument does not bear any signature of the vendor, the Purcell Safe Company, except the printed name of the said company at the bottom of the instrument, and that the instrument is in the form of an order directed to the Purcell Safe Com-

pany, whose name is also printed at the left hand upper corner of said instrument immediately above the words "Please deliver, etc."

The evidence shows, without contradiction, that one James Lynch, the sales manager of appellant, conducted all the negotiations leading to the sale of said deposit boxes, that he filled out the blanks in the said instrument, that all the conditional sale contracts made by appellant, while the said James Lynch was sales manager, a period of five years and a half, and for several years before that time, were made in the form shown in the said instrument, that is, in the form of an order for the goods sold written on a blank form provided by appellant, with the name of appellant printed at the head and at the bottom of said blank; that no one was authorized or allowed to use any other form of signature or any other name except the printed name of the company found on the contract; that such was the invariable custom of the officers of the company in making conditional sale contracts; that after the said S. C. Osborn had signed the said instrument in duplicate, one copy thereof was delivered to the said Osborn by said James Lynch and the other was retained by said James Lynch for the appellant; that the latter copy was filed, within the time required by law, with the auditor of King County, at the request of the appellant (Record, p. 20). Under such evidence it is clear that the instrument was signed by appellant within the meaning of the statute.

"The word 'sign' as a verb has several shades of

meaning and hence a statutory requirement that an instrument in writing, or a pleading shall be signed by some person or officer to make it complete, is much more general and comprehensive than a similar requirement that such instrument or pleading must be subscribed by the person or officer * * *. On the same principle the 'signing' of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his 'written signature' to it implies. When a person attaches his name or causes it to be attached to a writing by any of the known modes of impressing his name on paper with the intention of signing it, he is regarded as having 'signed' the writing."

Hamilton v. State, 2 N. E. 299, 300 (Ind.)

In that case it was held that where the name of the prosecuting attorney appeared in print on an indictment this was a sufficient compliance with a statute requiring the indictment to be "signed" by the prosecuting attorney.

In *Cummings v. Landes,* 117 N. W. 22, the Supreme Court of Iowa held that a printed notice of a suit to foreclose a mortgage containing the printed signature of the attorney for the plaintiff was sufficient compliance with a statute requiring such notice to be "signed by the plaintiff or his attorney." The Court said:

"Our statute requires that the original notice be 'signed by the plaintiff or his attorney.' This is to authenticate it as coming from the plaintiff in the action. A written signature is not in terms exacted. To sign, in the primary sense of that expression, means to make a mark, and the signature is the sign thus made. By long usage, however, influenced, no doubt, by the spread of learning, signature has come

ordinarily to be understood to mean the name of a person attached to something by himself, and therefore to be nearly synonymous with 'autograph.' This signification is derivative, however, and not inherent in the word itself. In re *Walker's Estate,* 110 Cal. 387; 42 Pac. 815; 30 L. R. A. 460; 52 Am. St. Rep. 104."

"Looking at the original meaning of the word, in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper, whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service."

The Supreme Court of Iowa says that the statute required the notice to be "signed by the plaintiff or his attorney * * * *to authenticate it as coming from the plaintiff in the action.*" (Italics ours.) The statute of the State of Washington requires conditional sale contracts to be "signed by the vendor and vendee" in order that third persons may know who the vendor and vendee are, and any signature which enables third persons examining the records to ascertain who is the vendor or vendee in a certain conditional bill of sale should be held sufficient under the statute.

In *Schneider v. Norris,* 2 M. & S. 286, it was held that a bill of particulars in which the name of the vendor was printed, and that of the vendee written by the vendor, was a sufficient memorandum of the

contract within the statute of frauds to charge the vendor. And Lord Ellenborough said:

"If this case had rested merely on the printed name, unrecognized by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt, whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract."

In this case by taking the instrument to the office of the auditor of King County and requesting that the said instrument be filed in the manner required by law in the case of conditional sale contracts, the appellant acknowledged that the printed words "Purcell Safe Co." was its signature, and that a conditional sale contract in the terms mentioned in said instrument had been entered into by appellant and the said S. C. Osborn, and the endorsement, "Filed at the request of vendor, Feb. 21, 1910, at 31 min. past 3 P. M. Records of King County, Washington. Otto A. Case, County Auditor, J. F. Lottsfeldt, Deputy," on the back of said instrument, made known to any one who saw fit to examine the records of King County the fact that the property described

in said instrument had been sold to said Osborn by appellant by an instrument reserving title to the appellant until complete payment of the purchase price.

In *Drury v. Young,* 58 Md. 546; 42 Am. Rep. 343, the Court, in construing the Maryland statute of frauds, held that the note or memorandum in writing required by the statute was sufficiently signed when the name of the party to be charged was printed in a letter head of the vendor. Referring to *Higdon v. Thomas,* 1 H. & G. 152 (Md.), the Court said:

"This decision of our court settles the question that the place of the signature in the memorandum is immaterial and the English cases are equally emphatic that the name may as well be printed as written, if the printed name is adopted by the party to be charged."

In Williston on Sales it is stated that the signature to the memorandum required by the statute "may be made in pencil, or rubber stamp, or a printed signature already on the paper may be adopted."

Williston on Sales, p, 139.

In Benjamin on Sales, §§ 259-264 (Ed. 1888), the same rule is laid down.

Under these authorities, and others which might be cited, the instrument in question in this case was sufficiently signed to comply with the statute of Washington providing "that no contract for the sale of goods, wares, or merchandise for the price of fifty dollars or more, shall be good and valid, unless

* * *, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby." (2 Rem. & Ball. Code, §5290.)

There is no reason why a contract sufficiently signed to be enforceable under the statute of frauds should not be sufficiently signed to be valid as a conditional sale contract. The statute relating to conditional sales does not require a signature different from that required by the statute of frauds. Under the latter statute any signature adopted by the party to be charged is sufficient. Under the conditional sale statute it should be held that any signature is sufficient as long as third parties may know that it is the signature which the parties have adopted. The record of the instrument in this case disclosed the fact that the Purcell Safe Company was the vendor of the goods described in said instrument, that said instrument was recorded *at the request of said vendor,* which fact clearly indicated that said vendor had adopted, as its signature, the name printed on said instrument.

We respectfully submit that the decree of the Honorable District Judge should be reversed.

HUGHES, MCMICKEN, DOVELL & RAMSEY,
OTTO B. RUPP,
Attorneys for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY,
Bankrupt.

PURCELL SAFE COMPANY, a corporation,
Appellant,

vs.

NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt,
Appellee.

No. 2055

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE

WALTER A. McCLURE,
HENRY F. McCLURE,
WM. E. McCLURE,
Attorneys for Appellee.

PRESS OF P. L. ALLEN

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of S. C. OSBORN, doing business as S. C. OSBORN & COMPANY, *Bankrupt.* PURCELL SAFE COMPANY, a corporation, *Appellant,* vs. NELSON W. PARKER as Trustee of the Estate of S. C. Osborn, doing business as S. C. Osborn & Company, Bankrupt, *Appellee.*	No. 2055

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE

ARGUMENT.

The question presented is the validity of a certain writing claimed by the appellant to be a contract of conditional sale. Pursuant to stipulation between the appellant and the appellee, the safe

deposit boxes mentioned in the writing have been sold, with the agreement that the lien (if any) of the appellant shall be impressed upon the moneys in the possession of the trustee.

The material section of the statute of the State of Washington relating to conditional sales is correctly set forth on page 4 of appellant's brief. That section has been construed by this Court (*In re American Machine Works, Chilberg vs. Smith,* 174 Fed 805, 23 A. B. R. 483), and by the Supreme Court of the State of Washington (*American Multigraph Sales Company vs. Jones,* 109 Pac. 108, 58 Wash. 619), and a strict rule of construction has been adopted. By those decisions the rule of property has been established for the State of Washington that a conditional sale of personalty placed in the possession of the vendee shall become absolute unless a memorandum, stating the terms and conditions of the sale and signed by both parties, shall be filed, within ten days after taking possession, in the office of the county auditor of the county in which the vendee resided at the time he took possession. It is essential that the memorandum shall be signed by both the vendor and the vendee.

In this case the memorandum was an order addressed to the appellant and signed by S. C. Osborn Co. and by S. C. Osborn. The order was as follows:

THE GENUINE HALL'S SAFE & LOCK CO.'S SAFES.

Read this contract before signing.

Seattle, Wash., Feb. 16, 1910.

Purcell Safe Co.

Seattle, Wash.

Please deliver the one group of 1020 safe deposit boxes built for us and already in freight depot in Seattle, marked to S. C. Osborn & Co., Town of Seattle, County of King, State of Wash., via team, for which we agree to pay to your order the sum of ($5,174.00) five thousand one hundred and seventy-four dollars, as follows: $2,000.00 cash paid this day and a note for the balance, $3,174.00, for 12 months from this date bearing interest at 7% per annum; for safe delivery at 507 Third Ave., Seattle, Wash.

The undersigned agree to forward the cash payment, together with the notes above described, to you upon arrival of safe, failing in which the whole amount shall become due and payable immediately. It is further agreed that the undersigned shall not permit the same to be removed from the place above mentioned, nor injured, nor taken by any other person or process. And it is agreed that you do not part with, nor relinquish your claim on, or title to, said safe, until the cash or deferred payment or notes are fully paid, and in default of any or all of the payments for the safe or conditions as agreed, you or your agent may, without process of law, take possession of and remove said safe, and retain any payments that may have been made on account of said safe, in lieu of the use of said safe, as rent or charges and damages on safe. All payments to be made to Purcell Safe Co. at the office of the company, Seattle, Wash. The undersigned agree to keep the above safe insured for its full value in a good company at its own expense, and in the

event of a fire this contract shall be a lien upon said insurance policy for the amount that may at that time be due upon this contract. In the event of failure to make payments when due, interest at the rate of ten per cent. per annum shall be paid upon such deferred payments from the time when due until paid, and if for any cause Purcell Safe Co. shall bring suit to recover possession of said safe in accordance with the terms of this contract, the undersigned agrees to pay attorney's fees and costs of court. It is understood and agreed by the undersigned that all the conditions of the order are contained in the above, that no verbal statement or agreements with the agent shall bind the Purcell Safe Co. to anything not written in the body of this order and that this order is not subject to be countermanded.

S. C. OSBORN CO.
S. C. OSBORN.

Salesmen are not allowed to collect for us. Any payments made to them will be at your risk.
PURCELL SAFE CO.

We request that the Court examine the original exhibit (Petitioner's Exhibit "1-A," copy shown on pages 19 and 20 of Transcript of Record) transmitted here for inspection by order of the Court below (Record, p. 41). That exhibit is substantially a fac-simile of the original order so far as concerns the form and manner of signing and the relation of the names of the parties thereto (Referee's certificate, Record, p. 29). It is to be noted that immediately following the signatures "S. C. Osborn Co." and "S. C. Osborn," appears a printer's rule extending across the entire face of

the instrument and cutting off what is below from what is above. Then are printed these words:

Salesmen are not allowed to collect for us. Any payment made to them will be at your risk.

PURCELL SAFE CO.

The order was a request to the Purcell Safe Co. to deliver the boxes; but there was no agreement or covenant that the Purcell Safe Co. was to, or would, do anything. S. C. Osborn Co. and S. C. Osborn were to perform every agreement set forth in the order. They were to keep every covenant. Everything was to be done by them. Nothing was to be done by the appellant. It made no agreement. It assumed no responsibilty. No liability was entailed upon it.

No intent is shown on the part of appellant to bind itself in any way whatever. As to it the order did not state the "terms and conditions" of the sale. The order was merely a proposal to the appellant, setting forth in detail what were the "terms and conditions" on which the bankrupt was willing to make the purchase. The writing does not show that the appellant ever accepted the proposal. The so-called agreement was absolutely unilateral.

The only signature claimed to have been made by the appellant is that following the instructions as to payments, appearing below the printer's rule. Those instructions were a warning that salesmen had no authority to collect, and that payments made to salesmen would be made at the risk of the payers.

Moreover, we have in this case the "Purcell Safe Company," a Washington corporation, claiming an adoption, as its signature, of the printed words "Purcell Safe Co." The laws of the State of Washington provide that the corporate powers of a corporation shall be exercised by the board of trustees (Rem. & Bal. Code, Vol. 2, Sec. 3686). The sole proof of such adoption is the testimony of Mr. Lynch, the sales manager (Record, p. 12):

"Our uniform plan was to use the printed form of which this is a copy. * * * No one was authorized or allowed to use any other form of signature or any other name except what was contained on that contract."

Judge Hanford correctly held below that the custom as proved could not override the statute (Record, p. 31):

"The evidence proves that part of the purchase price for the safe deposit boxes remains unpaid; that the Purcell Safe Company furnishes its agents printed blanks for such contracts, each of which has at the bottom its name, "Purcell Safe Co." printed; and that the contract in question was not signed by the vendor otherwise than by adoption by its officers of the printed name as its signature and the signing thereof in duplicate by the vendee. I do not mean to decide that a corporation may not by a resolution of its board of directors adopt a signature made by type and a printing press for authenticating its contracts; nor that the long continued practice of its officers in issuing contracts so authenticated may not estop it from repudiating obligations assumed in that manner, but I do concur with the referee in holding that the

custom as proved does not meet the plain requirement of, and can not override, the statute."

Such was also the view of Judge Hoyt, the referee. We think the opinion of Judge Hoyt is instructive, and therefore present same as follows:

"The instrument relied upon as constituting a conditional sale contract was in the form of an order directed to the Purcell Safe Co. and signed by S. C. Osborn Company and S. C. Osborn, and so far as the terms of the order were concerned the said Purcell Safe Co. was a party thereto only by reason of the fact of the order being directed to it. There was no agreement or covenant on the part of the said Purcell Safe Co. that it would do anything in the premises. The order was written upon the stationery of the said Purcell Safe Co., a corporation, which said stationery had printed thereon at the bottom below where the order was signed by the said S. C. Osborn the words 'Purcell Safe Co.' and nothing more.

"The evidence introduced showed simply that this order was filled out by an agent of the said Purcell Safe Co., signed by the said Osborn in his presence, and delivered by him in the ordinary course of business, and that in pursuance thereof the property described therein was delivered to the said S. C. Osborn, and thereafter and within the time provided by law the said instrument was duly recorded in the auditor's office of the proper county.

"Under this state of facts I am of the opinion that the sale became absolute, notwithstanding the recording of the order in the auditor's office, as hereinbefore stated, as in my opinion it was not signed by the vendor within the meaning of our statute, which requires a conditional sale contract to be signed by both parties thereto. It certainly was not signed by any affirmative act of the corporation,

or its agent, after it had been prepared, and if it could be held that the said vendor had signed it it would be by reason of the fact that there was an adoption of the signature printed on the blank by the agent at the time the order was presented, but the only testimony tending to show any such adoption was the fact that the agent testified that he intended what was done to constitute a proper making of a conditional bill of sale, and that the transaction was in the ordinary course of business, and I am of the opinion that no such adoption of the signature was shown as would make it from the date of such adoption the signature of the vendor corporation. What was done might have been sufficient to bind the corporation as to any agreement to be performed on its part by way of estoppel, but as has been before said, the corporation had agreed to do nothing, and for that reason any doctrine of estoppel could not be applied. The only object of the signing of the instrument by the vendor would be that when so signed and recorded, our statute as to conditional sales would be complied with, so that in my opinion the signature should be so placed upon the instrument to be recorded as to show a proper signing by the corporation, without resorting to extraneous proof as to the circumstances under which the instrument was signed."

The petition and adjudication in this case were filed and entered in December, 1910. As far as the Bankruptcy Act is concerned, the right of the trustee to the property in question is therefore governed by section 8 of the amended act of June 25, 1910, amending section 47a (2) of the Bankruptcy Act. That amendment provides:

"And such trustees, as to all property in custody, or coming into the custody, of the bankruptcy court, shall be deemed vested with all the rights,

remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Decisions holding that a trustee has no rights other than those which were vested in the bankrupt are therefore no longer controlling.

We submit that the decree of the Court below should be affirmed.

WALTER A. McCLURE,
HENRY F. McCLURE,
WM. E. McCLURE,
Attorneys for Appellee.

No. 2055

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of S. C. OSBORN, doing business as S. C. Osborn & Company,
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PURCELL SAFE COMPANY
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Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

SUPPLEMENTAL BRIEF OF APPELLEE.

WALTER A. McCLURE,
HENRY F. McCLURE,
WM. E. McCLURE,
Attorneys for Appellee.

Filed this.....day of November, 1911.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2055

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United States Circuit Court of Appeals

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SUPPLEMENTAL BRIEF OF APPELLEE.

Supplemental Argument.

The Amendment of 1910 to Section 47a (2) of the Bankruptcy Act, with respect to conditional sales

and the title vested in a trustee in bankruptcy, has been construed in the following recent cases:

In re Franklin Lumber Co., (E. Dist. Pa., decided May, 1911), Fed. ,26 A. B. R. 37;

In re Clarence S. Hammond (Nor. Dist. Ohio, decided March, 1911), 188 Fed. 1020, 26 A. B. R. 336;

In re Gehris-Herbine Co., (E. Dist. Pa., decided July, 1911), 188 Fed. 502, 26 A. B. R. 470;

In re Bazemore (Nor. Dist. Ala., decided May, 1911), 189 Fed. 236, 26 A. B. R. 494;

In re Calhoun Supply Co., (Nor. Dist. Ala., decided July, 1911), 189 Fed. 537, 26 A. B. R. 528;

In re Hartdagen (Middle Dist. Pa., decided July, 1911), 189 Fed. 546, 26 A. B. R. 532.

In the case of In re Gehris-Herbine Co., supra, the court also considered that portion of the 1910 Amendment to Section 47a (2) which provides that "trustees * * * as to all property not in the custody of the Bankruptcy Court shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied". In that case a subsequent agreement appeared purporting to revest possession and title in the vendor. Nevertheless the court refused to permit redelivery, holding that the transaction was a sale with a condition as to title an-

nexed, and that such a condition could not be enforced against execution creditors, and that the trustee must be deemed an execution creditor under the above amendment.

We think it will serve no useful purpose to discuss the decisions of the courts as to what is, or is not, a signature. There is a labyrinth of rulings. As to this case there seems to be no authority directly in point on that proposition. We have no quarrel with the cases cited in appellant's brief. But it has been held that a printed signature is not the signature of the party sought to be bound.

> Nightingale vs. Oregon Cent. R. Co., 18 Fed. Cas. No. 10,264, 2 Sawy. 338.

In the case of In re Hartdagen, supra, Judge Witner says that "the intention of the parties must be ascertained from the writing", a suggestion in line with the conclusion of Judge Hoyt, the referee, in the case at bar, that the trustee should not be required to meet "extraneous proof as to the circumstances under which the instrument was signed", and that "the signature should be so placed upon the instrument to be recorded so as to show" in itself "a proper signing by the corporation".

For the purpose of the argument let us assume that there is no conditional sale statute of the State of Washington. Then certainly the question as to the title vested in the trustee and the title claimed to have been reserved by the Purcell Safe Company

must be determined by the Bankruptcy Act; and in such event the case comes squarely within, and must be governed by, Section 47a (2) as amended. As to the property in question the trustee is therefore "vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings theron", the property having come into the custody of the Bankruptcy Court. If the ruling of Judge McPherson, in the case of In re Gheris-Herbine Co., supra, is to be followed, the transaction between the appellant and the bankrupt was a sale and not a bailment. Therefore the conclusion necessarily follows that the title of the trustee must be held paramount.

The state statute is not in derogation of the Bankruptcy Act, but adds thereto. The case for the trustee becomes stronger when the state statute is considered. The court will observe that the statute is affirmative in form, and not negative; that sales of personalty placed in the possession of the vendee *shall be absolute* unless certain requirements are fulfilled. Those requirements are clearly set forth. There is no ambiguity or uncertainty. Compliance therewith is easy. There is no reasonable excuse for the appellant's failure to comply with the plain requirements of the statute. Strict construction of the state statute is essential if its manifest purpose is to be observed.

The argument in appellant's brief (p. 12) that the appellant acknowledged the signature as its own

by taking the instrument to the office of the County Auditor and requesting that it be filed as a conditional sale contract, should not appeal to the court. The most that can be said is that thereby the creditors were charged with knowledge of the existence of the writing and of its terms and conditions and of its manner of execution. It was no more potent to reserve the title in the appellant than an improperly executed deed is to convey real property. The conditional sale statute of the State of Washington and the provisions of the Bankruptcy Act are both to be read into the instrument, and the creditors of the bankrupt (and in consequence the trustee) have therefore the full benefit of the omissions from, and the defects in, the writing, *as the instrument appeared on file,* and had the same from the date it was filed.

Nor should the argument in reference to the statute of frauds (appellant's brief, pp. 13-14) have weight as to the sufficiency of appellant's signature to the writing. "The party to be charged" under the statute of frauds is the vendee. In this case "the party to be charged" is the bankrupt. But appellant's contention is that the trustee is "the party to be charged". The rights, remedies and powers of the trustee are greater than one standing in the shoes of the bankrupt, for the trustee represents the creditors as well. The trustee cannot be "the party to be charged", for, as we have seen,

he has the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings.

> Bankruptcy Act, Sec. 47a (2), Amendment 1910.

This is not a case where fraud is charged, or where there are even suspicions of fraud; but we think the court must determine the ruling to be made in this case from the standpoint of fraud. The evident purpose of the conditional sale law of the State of Washington was to prevent a fraudulent debtor, or a fraudulent creditor, or both, from robbing an estate by successfully claiming a reservation of title (or bailment, as Judge McPherson euphoniously puts it in In re Gehris-Herbine Co., supra) in the creditor as to personalty unreservedly placed in the possession of the debtor. The statute requires that the reservation of title be complete and that it shall promptly be made a public record. The object of the amendment of 1910 to the Bankruptcy Act is to achieve the same purpose.

> In re Bazemore, 189 Fed. 236, 26 A. B. R. 494;
>
> In re Calhoun Supply Co., 189 Fed. 537; 26 A. B. R. 528.

Otherwise it would be an easy matter for a principal creditor, who had been liberal with the bankrupt as to credit, and who held out to the bankrupt the promise of again aiding him in a business enterprise, to obtain the return of the merchandise there-

tofore sold by such creditor to the bankrupt and to support such redelivery by proof which could not be shown to be perjured, although such in fact. Thus estates would be impoverished and gross fraud perpetrated upon other creditors who had extended credit in the well-founded belief that the redelivered merchandise was the property of the bankrupt. The provisions of the Bankruptcy Act as to preferences will not reach a case like that, and every lawyer of experience knows that such a wrong can only rarely successfully be attacked on general equitable principles.

Clean, honest and efficient administration of the estates of bankrupts requires rigid enforcement of both the Bankruptcy Act as amended and the conditional sale law of the State of Washington. The Bankruptcy Act and the state statute were born of bitter experience, as the record of every court administering them will show. The rule of strict construction adopted in Chilberg v. Smith, 174 Fed. 805, 23 A. B. R. 483, and in American Multigraph Sales Co. v. Jones, 109 Pac. 108, 58 Wash. 649, is correct and should be applied to this case.

Respectfully submitted,

WALTER A. MCCLURE,
HENRY F. MCCLURE,
WM. E. MCCLURE,
Attorneys for Appellee.

No. 2056

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Plaintiff in Error,

vs.

THOMAS CLARK,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

A. C. McDANIELS, of Butte, Montana, and WALSH & NOLAN, of Helena, Montana,
Attorneys for Plaintiff and Defendant in Error.

M. S. GUNN, Helena, Montana,
Attorney for Defendant and Plaintiff in Error.

[Transcript on Removal.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 836.

THOMAS CLARK,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

BE IT REMEMBERED, that on the 9th day of July, 1907, a Transcript on Removal of said cause from the District Court of Silver Bow County, Montana, was duly filed herein, said Transcript on Removal being in the words and figures following, to wit: [1*]

*Page number appearing at foot of page of original certified Record.

In the District Court of Silver Bow County, Montana.

No. ——.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Corporation),

Defendant.

Complaint.

Plaintiff alleges:

1. That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of Wisconsin, and doing business in the State of Montana; and is operating a line of railroad in and about the city of Butte, Silver Bow County, Montana, and is operating said line of railroad from the eastern boundary line of the State of Montana to the western boundary line of the State of Montana; and that it was so engaged in operating said railroad on the 17th day of November, 1906.

2. That on said date and for a long time prior thereto the said defendant was in control of and operating a series of parallel tracks lying immediately east of and northeast of the Freight Depot of the said defendant in the city of Butte, Silver Bow County, Montana, which said tracks extended more than two hundred yards east of said freight depot. That there is now and for many years heretofore has been a [2] public highway branching off of east Platinum Street, Butte, Montana, at about the inter-

section of East Platinum Street and Beatie Avenue, which said public highway runs in and easterly direction and then in a southerly direction and crosses said tracks. That said public highway has been used for a highway, public street or roadway and been regarded as such for more than ten years; and that portion which is now crossed by the said tracks of the defendant has been continually traveled over and used for a great number of years by the public. That the said defendant was on the 17th day of November, 1906, and for a long time prior thereto had been engaged in running numerous cars and engines over said tracks. That the said public highway crossing said tracks was very continuously and extensively used for travel by the public, and that such fact was well known to defendant and its servants. That by reason of the frequent operation of engines and cars thereover, and the use thereof by the public, said crossing was a dangerous place for persons passing thereover, and that the operation of the said engines and cars thereover endangered the lives of such persons, which fact was well known to the defendant and its servants.

3. That on the 17th day of November, 1906, the defendant placed an engine and at least three cars on a certain one of said tracks crossed by the said public highway, the said engine being attached to said cars, and east of them; that the said engine and cars backed westerly until the front end of the engine was west of the point where said public highway crosses the said track, and the said engine and cars stopped. That while said engine and cars were

backing westerly, this plaintiff was driving a wagon and team along said public [3] highway and north of said track; that when said engine and cars had stopped and were standing still, this plaintiff started to drive the said wagon and team across the said track; that without warning and carelessly and negligently, and without exercising ordinary care, the said defendant, by its servants, while said plaintiff was in the act of crossing the said track and in said public highway, suddenly and with great force and speed, started said engine easterly along said track and towards said highway and said plaintiff. That the said engine struck the wagon on which this plaintiff was riding and struck and knocked the plaintiff to the ground. That when the said engine so struck and knocked said plaintiff as aforesaid, the blow and collision resulting therefrom seriously hurt, cut, bruised, wounded and disfigured said plaintiff, and greatly *shock* and injured him, and rendered him immediately insensible, in which insensible condition he remained for a space of about two hours; that his head was seriously cut, bruised, wounded and disfigured; that his body was seriously hurt, bruised and wounded, all of which said injuries so inflicted made the plaintiff sick and sore, and obliged him to be confined in a hospital for a long time, and caused him great mental and physical suffering; and that plaintiff is permanently injured and disfigured as a result of said blow and collision. That the servants of the said defendant could have seen and did see and ought to have seen the plaintiff's position and

danger; and that defendant could have, in the exercise of ordinary care and caution, prevented him from being injured as aforesaid, but did not so protect him. [4]

4. Plaintiff alleges that by reason of the negligence and lack of ordinary care and caution on the part of said defendant, he was injured as aforesaid; and that by reason thereof he has sustained damages in the sum of five thousand ($5,000.00) dollars; no part of which has been paid.

5. Plaintiff alleges that by reason of the injuries received as aforesaid, he was confined in a hospital for a period of about thirty-three days, and it became and was necessary for him to pay the sum of about two hundred and eighteen ($218.00) dollars for physicians' and surgeons' fees and hospital fees, and he is thereby damaged in the sum of two hundred and eighteen dollars, which said sum is the reasonable value paid for said services.

6. That on said 17th day of November, 1906, the date the said injuries were received, this plaintiff was following the occupation of a teamster, and earning three dollars per day, which said sum is the reasonable value of his services per day; that by reason of the injuries received as aforesaid, this plaintiff was unable to follow any occupation whatever until March 1st, 1907; and he is thereby damaged in the sum of three hundred and twelve ($312.-00) dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of five thousand, five hun-

dred and thirty ($5,530.00) dollars, and costs of suit.

A. C. McDANIEL,
Attorney for Plaintiff. [5]

State of Montana,
County of Silver Bow,—Scilicet.

Thomas Clark, being first duly sworn, on oath, says: That he is the plaintiff named in the foregoing complaint; that he has read the foregoing complaint, knows the contents thereof, and that the matters and things therein stated are true.

THOS. CLARK.

Subscribed and sworn to before me this 18th day of May, 1907.

[Seal] PETER BREEN,
Notary Public in and for Silver Bow County, Montana.

Duly verified. [6]

[Summons.]

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

THOMAS CLARK,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Corporation),
Defendant.

The State of Montana Sends Greeting to the Above-named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk

of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness my hand and the seal of said Court this 20th day of May, A. D. 1907.

[Court Seal] WILLIAM E. DAVIES,
Clerk.
By L. F. Kirby,
Deputy Clerk.

Sheriff's Office,
County of Silver Bow, Montana.

I do hereby certify that I received the within Summons on the 20th day of May, A. D. 1907, and personally served the same on the 21st day of May, A. D. 1907, by exhibiting the original and delivering a true copy thereof, together with a copy of the complaint in said action, to J. A. McMillian, agent of the defendants Northern Pacific Railway Co., a corp., in the county of Silver Bow, Montana, they being the defendants named in said Summons.

Dated this 21st day of May, A. D. 1907.

CHAS. S. HENDERSON,
Sheriff.
By Wm. M. Bowen,
Dept. Sheriff.

Copy..... ....$....
Service..... ....$1.00
Mileage..... 20

Total..... ....$1.20

Duly verified. [7]

[Petition for Removal.]

In the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

To the Honorable the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow:

Your petitioner, Northern Pacific Railway Company, respectfully shows unto this Honorable Court that it is the defendant in the above-entitled action; that the matter and amount in dispute in said action, which is of a civil nature at law, exceeds, exclusive of interest and costs, the sum of Two Thousand Dollars.

That your petitioner, Northern Pacific Railway Company, was, at the time of the commencement of said suit, and prior thereto and ever since has been and yet is a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, and a citizen of said State; and that the

plaintiff Thomas Clark was, at the time of the commencement of said suit, and still is, a citizen of the state of Montana. And that your petitioner, as such corporation, and in compliance with the laws of the State of Montana relating to foreign corporations, has designated an agent for the State of Montana, upon whom service of all process may be had, and has filed such designation, together with the consent of such agent, with the Secretary of State of Montana; and that the principal [8] place of business of your petitioner within the State of Montana now is at the city of Helena, Montana, and was so for a long time prior to the commencement of said suit, and was at the time of the commencement thereof, and now is, at Helena, Montana; and that the residence of such statutory agent and the place of business of said defendant Northern Pacific Railway Company is so designated as at Helena, in the certificate so filed with the Secretary of State of the State of Montana; and the aforesaid designation of agent for the service of process and the consent of such agent was done and had long prior to the commencement of this suit, and was in full force and effect and unrevoked, and said agent was so residing at Helena, aforesaid, at the time of the commencement of this suit; and also at the time of the service of summons and copy of complaint.

Your petitioner further alleges that said action is brought to recover damages in the sum of $5,530.00 on account of personal injuries alleged to have been sustained by plaintiff on or about November 17th, 1906, by being struck by an engine and cars of the

defendant while riding upon a wagon across the railroad tracks of this defendant in Butte, Montana, whereby plaintiff received certain injuries, as he alleges, to his head and body.

Your petitioner further offers and files herewith a bond with good and sufficient sureties for its entering in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto. [9]

WHEREFORE, your petitioner prays this court to accept this petition and the said bond and to approve the same, and proceed no further in said action save to cause the record therein to be removed to the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, at Helena, Montana. And so your petitioner will ever pray.

NORTHERN PACIFIC RAILWAY COMPANY.

By WM. WALLACE, Jr.,
Its Division Counsel.

State of Montana,
County of Lewis & Clark,—ss.

Wm. Wallace, Jr., being first duly sworn, makes oath and says:

That he is an officer of the Northern Pacific Railway Company, above named petitioner, to wit: Its Division Counsel for the State of Montana, and as such makes this verification for and on its behalf;

that he has read the foregoing petition and knows the contents thereof and the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. WALLACE, Jr.

Subscribed and sworn to before me this 3d day of June, 1907.

[Seal] R. F. GAINES,

Notary Public, in and for Lewis & Clark County, Montana.

Duly verified. [10]

[Bond on Removal.]

In the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant.

KNOW ALL MEN BY THESE PRESENTS, that Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, as principal, and E. S. Richards and E. W. Beattie, as sureties, are held and firmly bound unto Thomas Clark in the penal sum of One Hundred Dollars, for the payment of which, well and truly to be made to said Thomas Clark, plaintiff, we bind ourselves and our repre-

sentatives, successors, heirs and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 3d day of June, 1907.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT WHEREAS the said Northern Pacific Railway Company, defendant in the above-entitled action is about to petition the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, for the removal of a certain cause therein pending, wherein Thomas Clark is plaintiff and Northern Pacific Railway Company is defendant, to the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, at Helena, Montana:

NOW, if said Northern Pacific Railway Company shall enter into said Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the first day of its next session, a copy of the record in said suit, and well [11] and truly pay all costs that may be awarded by said Circuit Court, if such court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

Witness our hands and seals this 3d day of June, 1907.

NORTHERN PACIFIC RAILWAY COMPANY.

By WM. WALLACE, Jr.,
Its Division Counsel.
E. S. RICHARDS.
E. W. BEATTIE.

State of Montana,
County of Lewis & Clark,—ss.

E. S. Richards and E. W. Beattie, being each duly sworn, for himself says: That he is a resident and freeholder of the State of Montana; is responsible and one of the sureties who subscribed the foregoing bond; that he is worth the sum of Two Hundred Dollars over and above his just debts and liabilities and exclusive of property exempt from execution by law.

E. S. RICHARDS.
E. W. BEATTIE.

Subscribed and sworn to before me this 3d day of June, 1907.

[Seal] R. F. GAINES,
Notary Public, Lewis & Clark County, Mont.

The foregoing bond, both as to form thereof and sufficiency of sureties, is this day approved.

Dated, 7th June, 1907.

GEO. M. BOURQUIN,
Judge of said Court.

Duly verified. [12]

[Order for Removal of Cause to Circuit Court.]

In the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant.

On this 7th day of June, the above action coming on to be heard on defendant, Northern Pacific Railway Company's petition for removal of the said cause to the United States Circuit Court, Ninth Circuit, in and for the District of Montana, at Helena, Montana; and it appearing to me that the said defendant is entitled to have said cause removed to said court; and that a good and sufficient bond has been filed in said action, conditioned as by the Acts of Congress provided:

NOW, THEREFORE, it is ordered that the said bond be approved and that the said suit and action be and the same hereby is removed to the United States Circuit Court, Ninth Circuit, in and for the District of Montana, at Helena, Montana; and the Clerk of this court is hereby authorized, ordered and directed to furnish the petitioner, Northern Pacific Railway Company, defendant herein, a duly certified copy of the record in this case upon the payment of the legal and customary fees for preparing said record. And this court will proceed no further in said

action unless the same shall be remanded from the Circuit Court as aforesaid.

Signed and passed in open court this 7th day of June, 1907.

GEO. M. BOURQUIN,
Judge of said Court. [13]

[Demurrer to Complaint.]

In the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

THOMAS CLARK,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Comes now the above-named defendant and demurs to the complaint of plaintiff on file herein for that the same does not state facts sufficient to constitute a cause of action.

WALLACE and DONNELLY,
Attorneys for Defendant.

Duly verified. [14]

State of Montana,
County of Silver Bow,
Office of the Clerk of the Court,—ss.

I, William E. Davies, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, do hereby certify that the above and foregoing 17 pages constitute

and are a full, true, compared and correct copy of the record on removal in said cause of Thomas Clark vs. Northern Pacific Railway Company, being respectively the complaint, summons and return, petition for removal, bond on removal, order of removal to the United States Circuit Court, District of Montana, at Helena, Montana, and demurrer to complaint.

Witness my hand and the seal of said court this 20 day of June, 1907.

[Seal] WILLIAM E. DAVIES,
Clerk of said Court.

[Indorsed]: Title of Court and Cause. Transcript on Removal. Filed July 9, 1907. Geo. W. Sproule, Clerk. **[15]**

And thereafter to wit, on December 7, 1908, an order overruling demurrer was duly made and entered herein, being in the words and figures following, to wit:

[Order Overruling Demurrer to Complaint.]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 836.

THOMAS CLARK

vs.

NORTHERN PACIFIC RAILWAY CO.

This cause came on regularly for hearing at this time upon demurrer to complaint and was submitted without argument; and thereupon, after due consid-

eration, it is ordered that said demurrer be and hereby is overruled, and defendant granted 20 days to answer.

Entered, in open court, December 7th, 1908.

GEO. W. SPROULE,
Clerk. **[16]**

And thereafter, on December 10, 1908, the Answer of Defendant was duly filed herein, being in words and figures following, to wit: **[17]**

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THOMAS C. CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Corporation),

Defendant.

Answer.

Comes now the above-named defendant and answering the complaint of the plaintiff herein on file admits, denies and alleges as follows:

I.

Admits the allegations of paragraph one of said complaint.

II.

Admits that defendant had, in the usual and customary operation of its railway, maintained and used in and about the vacinity of its station at Butte, Montana, a syatem of paralell tracks and that on

November 17th, 1906, and for a long time prior thereto it was and had been constantly moving engines and cars thereon. Admits that on said date, while plaintiff was attempting to cross the system of tracks referred to, the wagon in which plaintiff was riding was struck by one of defendant's engines and plaintiff was thrown therefrom.

III.

Save as is herein specifically admitted or denied, defendant generally denies each and every allegation and all the allegations contained in plaintiff's said complaint.

Defendant further answering and for a first separate defense to the alleged cause of action stated in plaintiff's complaint alleges: [18]

I.

That the injuries, if any sustained by the plaintiff as set forth in his complaint, were due to and proximately caused by his own contributing fault and carelessness.

WHEREFORE, having fully answered, defendant prays judgment for its costs herein expended.

WM. WALLACE, Jr.,
JOHN G. BROWN,
R. F. GAINES,
Attorneys for Defendant.

State of Montana,
County of Lewis & Clark,—ss.

Wm. Wallace, Jr., being first duly sworn, upon oath deposes and says:

I am an officer of the defendant corporation, to wit, its Division Counsel for the State of Montana,

and as such make this verification for and in its behalf; I have read the foregoing answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

WM. WALLACE, Jr.

Subscribed and sworn to before me this *this* 9th day of December, 1908.

[Seal] R. F. GAINES,

Notary Public in and for Lewis and Clark County, Montana.

[Indorsed]: Title of Court and Cause. Answer. Filed Dec. 10, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [19]

And thereafter, to wit, on December 23, 1908, plaintiff filed his Reply herein, being in the words and figures following, to wit: [20]

In the District Court of the United States, Ninth Circuit, District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Corporation),

Defendant.

Reply.

The plaintiff replying to the answer herein alleges:

1. Denies the allegations contained in paragraph one of the defendant's first separate defense.

Wherefore, plaintiff having fully replied demands judgment as in his complaint.

A. C. McDANIEL,
Attorney for Plaintiff.

State of Montana,
County of Silver Bow,—scilicet.

Thomas Clark, being first duly sworn, says: That he is the plaintiff named in the foregoing reply, that he has read said reply and that the same is true.

THOS. CLARK.

Subscribed and sworn to before me this 22 day of December, 1908.

[Notarial Seal] A. J. ROSIER,
Notary Public in and for Silver Bow County, Montana.

Service of the foregoing reply acknowledged and copy received December 23d, 1908.

WM. WALLACE, Jr.,
JOHN G. BROWN, and
R. F. GAINES,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Reply. Filed Dec. 23, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [21]

And thereafter, to wit, on June 6, 1911, the Verdict of the Jury was duly filed and entered herein, being in words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 836.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of $780.00.

FRANCIS D. JONES,
Foreman.

[Indorsed]: Title of Court and Cause. Verdict. Filed and entered June 6, 1911. Geo. W. Sproule, Clerk. [22]

And thereafter, to wit, on the 8th day of June, 1911, Judgment was duly rendered and entered herein, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Judgment.

This cause came on regularly for trial on the 5th day of June, 1911, A. C. McDaniel, Esq., and Messrs. Walsh & Nolan appearing as counsel for plaintiff, and Messrs. Wallace, Brown and Gaines appearing as counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said cause, whereupon witnesses on the part of the plaintiff and on the part of the defendant were duly sworn and examined. After hearing the evidence, the arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and, being called, answered to their names and say they find a verdict for the plaintiff and against the defendant and assess the plaintiff's damages at Seven Hundred and Eighty Dollars ($780.00).

WHEREFORE, by virtue of the law and by reason of the [23] premises aforesaid, it is or-

dered and adjudged that said plaintiff do have and recover of and from said defendant the sum of Seven Hundred and Eighty Dollars ($780.00) with interest thereon at the rate of eight per cent (8%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at $52.70.

Judgment entered this 8th day of June, 1911.

GEO. W. SPROULE,
Clerk.

Attest a true copy of Judgment.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 8th day of June, A. D. 1911.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed and entered June 8, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on August 8th, 1911, a bill of exceptions, duly signed, settled and allowed, was filed herein, being in the words and figures following, to wit: [25]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial, upon the complaint, answer and reply, in the above-entitled court, sitting with a jury duly empaneled and sworn to try said cause, upon the 5th day of June, 1911, at ten o'clock A. M., whereupon the following testimony, and none other, was introduced:

Plaintiff's Case.

[Testimony of Thomas Clark, the Plaintiff.]

THOMAS CLARK, plaintiff, sworn, testified as follows:

Direct Examination.

My name is Thomas Clark, am sixty-eight years old. At the time I sustained the injuries, the subject of this action, I must have been sixty-four,—that is four years ago last fall. I was then employed by the East Side Coal Company; the owner or man-

(Testimony of Thomas Clark.)

ager of that Company was J. F. Swango. I had been employed by it four or five years,—not steadily, but good part of the time,—as teamster. Before that I worked as a stationary engineer in Butte. I went to Butte in 1892. I had crossed back and forth over there where [26] I was hurt for several years before I was hurt, in the city of Butte. Going right through the eastern portion of their yard, which is four blocks northeast of the Butte, Anaconda and Pacific depot. Where this crossing road cuts across there is six parallel tracks, some of them are further apart than others. A number of coal companies have their sheds there along these tracks, their coal is stored in them. This shed of the East Side Coal Company was about two blocks east, and on the south side, from the particular point where I was injured; I would say about 800 feet. This road goes across from Platinum to Aluminum Street, and crosses those tracks, and where it crosses there was planking between the rails. It was crossed every hour of the day, and several times an hour, by somebody. It is used in the movement of coal from the coal sheds. They all of them cross there, everyone of them cross there; in fact, it is the only way to get out without going around a considerable distance. I don't know when there wasn't a crossing there, I have crossed back and forth there myself for a number of years, I would say I had crossed there myself twelve or fifteen years to date. During the four or five years I worked there, sometimes I went across there a half a dozen times a day; other

(Testimony of Thomas Clark.)
times not more than once or twice. During those four or five years, it has been used by the public in general. It is a regular wagon road leading up to those crossings. I have seen the section crew put in and repair the planking, whenever the planking needed putting in there, I have noticed them there at different times; I couldn't say how often. Going from the end of the six tracks on one side to the other end would be about 300 feet. [27] On the 11th day of November, 1906, the day I was injured, I was driving a coal wagon for this company; I was crossing the track there, just about eleven o'clock. Well, I don't remember just where I had been; I had delivered a load of coal up somewhere, up in town, and was going back to the shed. I had a team and coal wagon. The bed is about eleven foot, of course, the wagon and team would be probably between eighteen and twenty feet, I would think. I was going south, down to the shed after another load of coal. I crossed two of the six tracks before I got to this crossing where the accident occurred. I saw them backing in a string of cars,—and engine. I was on the north side of the crossing when I saw them backing up there, and I stopped and waited for them to pass; they were going west, backing in west, a short distance east of the crossing. The distance between the second and third tracks is somewhere between fifty and sixty foot, where the road goes. After I crossed the second track, and was going toward the third track, south, I saw the train coming, and I stopped and waited for them to back in over the

(Testimony of Thomas Clark.)

crossing. When I stopped the team I was twelve or fifteen feet from the third track. After they had crossed, I started to go across, they went just a short distance and stopped, and I went on across,—supposed I was going to have time to get across; and when I got on the third track, why, they started up and ran into the hind end of the wagon.

Q. How long had you stopped the team there between the tracks?

A. Well, but a very short time, probably not more than two or three minutes, long enough for them to pass over the crossing. There were three or four box-cars attached to [28] the engine. They were stopped and standing still when I started to cross the track, and the engine was about twelve or fifteen feet from the crossing. I saw that they were coming right onto the wagon; I saw them coming ahead, but they were so close to the wagon that I had no time to do anything. There was no ringing of the bell; there was no signaling of any character, that I saw. I have no knowledge of anything after the wagon was struck, I was unconscious. It was the engine that hit the wagon. I am not sure whether it had any cars attached to it when it struck my wagon; my impression is that they hadn't. This was an ordinary coal wagon; when it was hit, I was sitting on the seat. When I recovered consciousness, I was in the Northern Pacific freight office, from four to five hundred feet from the crossing where I was struck. My head was pretty badly cut up here (indicating to the jury). Don't know

(Testimony of Thomas Clark.)

how it was that I got to the freight office. I was not attended by any doctor while in the freight office that I know anything about. After that I went to the Murray Hospital. I was in the hospital constantly thirty-three days; I went there to be treated every day for two or three weeks, besides what I was in the hospital.

Monday, June 5, 1911, 2:00 o'clock P. M.

I was put under the influence of chloroform, and my head operated on, by Dr. Larson. I suffered plenty of pain, I didn't go back to work at once; I wasn't able to work; in fact, I left the hospital before they quit treating me; the wound wasn't entirely healed when I left the hospital. I paid, on account of my treatment there, $218.00, including doctor's bills, nurse's bills, and other bills. I went to work again after this injury, the first of March, 1907. [29] I didn't go to work before, because I wasn't able to; in fact, I wasn't able to go to work when I did go to work. I went back to work for the same company, at the same kind of work, and continued at that same kind of work thereafter steady all that summer up until the fore part of the winter, and then I laid off a while through the winter, because work was slack, and I didn't feel like working through the cold weather, any way. After I went back to work again, there was no particular pain, just a weakness,—that was all; I wasn't strong by any means, and able to go in and do a day's work like I was before. I had a headache at times, and do yet. Sometimes it is very severe, so as to make me pretty sick, I have no

(Testimony of Thomas Clark.)

recollection of having them before. I was healthy; I never have had to go to a physician before the injury, since I was grown up. I was getting $3.00 a day before, and I got that wages when I returned to work in March, though I don't think I earned it. (Witness identifies Diagram, Plaintiff's Exhibit "A.") The tracks represented on this diagram are that yard over there, and the track where I was injured. These lines marked "B," "G" and "F" and "A," represent the tracks on the south side of the N. P. yards; this is all the north side here,—south side over here (indicating). The track on which I was injured is marked "A." This roadway is this line "I-Y," as shown upon this map; the "X" there, must be the crossing; that is the only thing that I could see that it was for. At the time the engine backed up with the cars, I was on the north side. At the time I stopped, I was just on the north side of this track (indicating), about fifteen or twenty feet. The engine was standing twelve or fifteen feet from the crossing, which would be right here, pretty close to the switch, where the [30] two tracks branch; at the mark "M," the crossing planks were about sixteen foot long. I am pretty nervous all right; was not before.

Cross-examination.

This set of tracks I spoke of was a part of the railroad yards of the Northern Pacific, in Butte, and had been while I worked there; drove the coal wagon; and these tracks shown on the Exhibit "A," are a part of those yard tracks; and the coal sheds spoken

(Testimony of Thomas Clark.)
of, lay along some of these yard tracks. The cars would be unloaded into the sheds; and would be taken out to the proper track or tracks, along the sheds, by the switch engines, which worked in placing cars opposite these coal sheds, in that part of the yard. The switch engine, instead of a slated pilot,—had steps on the front,—a footboard; and another one at the rear, footboard; you could tell them from a passenger engine in that way. The switchman would stand on that while they were running about the yard. This particular engine, running there that day, was a switch engine. It was facing east, so that when it stopped after backing down west, the front of the engine would be facing the crossing. This switch on the sketch, Exhibit "A," is where the tracks divided; it was one track down to the point "M," and there it split into two. One of these tracks after so splitting is marked "B," and the other is marked "C." This switch-stand at "M" was the point at which the switch lever was thrown to let anything coming down this north track out onto one or the other of the two divided tracks. I was driving on the north side of the track, and the road inclines to the east of south, as you go, toward the track; and the sketch shows about the inclination, so that as you approach the track, my head was turned rather in an easterly direction, generally speaking, [31] toward the south, but slightly to the east. The road crosses this track, on which the switch engine was moving, where the planking is. I was going over where the planking was, in the cen-

(Testimony of Thomas Clark.)

ter of the planking, as close as I can get to it, the planking was about sixteen feet wide. My wagon was a standard width lumber wagon width, somewhere in the neighborhood of seven feet, that is, the wheel tracks, so that there would be about four and a half feet of planking on each side of the wagon. This track on which this switch engine was then moving, was for switching cars to these other tracks, shown in the sketch. When I first discovered the engine, I was between the track marked "A" and the track next northward. The engine, then, was down just a little east of the crossing here. The cars was west of the engine, headed east. I was driving a team; alone in the vehicle. No cars had got to the crossing when I stopped, the cars passed in front of my team as I stood there. I had come to a stop to let the switch engine and cars go by. Was standing still during the time the switch engine and cars passed over this crossing; the heads of the horses were within about twelve or fifteen feet of the track. My team continued to stand in that position until the switch engine had crossed over the crossing. When the engine was coming back toward my wagon, I *though* there were no cars then attached, because they had backed in there and started out so quick, I naturally supposed they must have left them in one of those two forked tracks, coming out at the point "M." My estimate of the distance the engine was, or train was, from the crossing is an approximation. I had no means of marking the spot; I didn't particularly notice it either. When I

(Testimony of Thomas Clark.)

spoke of that distance, I meant the distance from the end of the planking [32] to the front of the engine. I think there was a space something like twelve or fifteen feet between the end of the engine —the front end of the engine and the planking; that might have varied somewhat, how much, I would not say. I drew the inference that they had left those cars because they started back so quickly.

Q. I believe you have stated that they stayed there but an instant?

A. Well, long enough so that I started to go across. At the time the engine struck the rig, I think the hind wheels was just about—well, probably pretty near the south rail; the wagon had crossed over the north rail, and was either about the south rail, or at some point between the two rails. I was sitting at the forward end of the wagon; the bell was not ringing, at no time. I can't tell how far east of the crossing the nearest end of the cars were, at the time when I stopped with my horses' heads twelve or fifteen feet from the crossing, they were close enough so I didn't consider I had time to go across; I would say about forty feet. After first observing them, until I came to a stop, I did not drive more than fifteen or twenty feet.

Redirect Examination.

After the engine went over the crossing, and before I was struck, it couldn't have been more than a couple of minutes; I just had time to drive on there and was about two-thirds of the way across.

(Testimony of Thomas Clark.)

Recross-examination.

It was the length of time it took me to drive from where my horses were standing at the time the switch engine passed west and reach the point where the engine struck the rear of my wagon.

(Examination by the Court.) [33]

Q. Did you see the engine moving after it came to a stop backing the cars?

A. I saw it just about the time it did strike the wagon, not before.

[Testimony of J. M. Swango, for Plaintiff.]

J. M. SWANGO, on behalf of the plaintiff, testified as follows:

Direct Examination.

My full name is J. M. Swango; I have lived in Butte thirteen years; I was the owner of the East Side Coal Company in 1906, and had been since the first of June of the same year. I know these yards where this accident occurred, I guess about nine years I have known them. My sheds were about six to eight hundred feet east, on the south side of the N. P. tracks, on the B. A. & P. tracks. Those tracks there on Exhibit "A" are approximately correct; of course, these may not have the same curves in them, but that is about the location. The yard there is level ground. There is a fence runs down on one side of it, and enclosed the Big Blackfoot Lumber Company's yard, outside of that it is open. There is coal sheds there, several of them, several warehouses; the old N. P. freight depot is on there too. There is a road crossing there, used by anyone

(Testimony of J. M. Swango.)
that wants to go up and down through there; always in condition for heavy hauling or for driving. It is used altogether by every coal dealer in town, I guess, to deliver his goods over that. I came to Butte thirteen years ago and went to work driving a furniture wagon up and down there. From that time on down to the present time it was used about the same, I should judge. This roadway is here on the map, running from "I" to "Y,"—it crosses them yard tracks where the road crosses the tracks, it is planked, all the tracks. This planking [34] has been placed and maintained by the railway company. I had known Clark about eight years. He had been working for me about five years before that. When I first went into the coal business, he drove the first team. My coal sheds do not show on this map. Between my coal sheds and this crossing there is no obstructions at all. He was working for me the day he was injured; when the collision took place, I was right at the west end of my sheds. Just before the collision, I saw him, he was just stopping as I saw him, on the north side of this track "A." He was right in the road at that time, there was a switch engine going west on the south side of him, in the direction of that crossing. There was cars on it, I don't know just how many; they passed the crossing, I could not tell how far. I saw him just start to drive up, the engine was past the crossing, the team was between me and the engine; I could see that. At that time, I could not tell whether the engine had got to a standstill, or whether it was still

(Testimony of J. M. Swango.)

moving east. I heard someone remark that a team was hit up there. I was up there in not to exceed five minutes. The wagon was upside down, part of it, and the horses over across on another track, up against the coal sheds. I did not see the plaintiff at that time, or the engine. The wagon—one hind wheel was all mashed up, and the front wheel—and I think there was maybe a couple of spokes and a bolt knocked out of it; the box was clear out of it; one hind wheel was broken and one front wheel was damaged. I saw Clark that afternoon in the N. P. freight house. The accident occurred around eleven o'clock, somewhere. Around two or three o'clock; I don't remember the exact time I went up there. He had a rag tied around his head; it was still bloody. He wasn't [35] exactly conscious, but still he knew me when I went in. I took him from the freight office. He received medical treatment that afternoon at my house, from Dr. Larson. He was taken to the hospital twelve hours after the injury. I visited him there every two days. His head was a very bad head, swollen, terribly swollen, tied up, bandaged. It was swollen until after he got out of the hospital. It was very evident that he was awfully sick. This swelling extended all over his face; the whole side of his head it was all bruised up. He went to work about the first of March, next year; he couldn't do a day's work. He worked two years and a half.

Q. And do you know why it was that he finally quit working for you?

(Testimony of J. M. Swango.)

By Mr. WALLACE.—I object to that on the ground that the witness has stated that he worked two years and a half, and the period of impaired earning capacity is fixed by this pleading up to March *the following,* and no impared earning can be showed after that time.

By the COURT.—The objection is overruled; defendant's exception noted.

A. Why, on account of this hard work, to get lighter employment for him.

During the time that he worked for me he was very nervous, and evenings very weak, his condition before he was injured, as compared with his condition afterwards, there was a great deal of difference between them. He was always a husky, good, hard worker, and after his injury he wasn't the same man by any means.

Cross-examination.

It was eleven o'clock in the morning, a sunshiny day. The track was clear from where I was standing to where the [36] plaintiff was standing; the buildings there did not effect the view at all. The fence of the Big Blackfoot Milling Company yards was a board fence, due north of him; he was almost due west of me. He was about the east end of the fence; the fence was the south line fence of the Big Blackfoot Milling Company's yards.

Redriect Examination.

This crossing was at grade.

Recross-examination.

What I meant by grade crossing, is the regular

(Testimony of J. M. Swango.)

traveled road, with plank over it between the railroad tracks. It was just this wagon road, with this railroad track on which the collision occurred.

Plaintiff offered in evidence Rule 230 of the book of rules. (Admitted.) Reading:

"The engine bell must be rung as the engine is about to move." And the fore part of 231 I desire to offer in evidence.

By Mr. WALLACE.—I object to that as immaterial.

By the COURT.—Objection overruled; defendant's exception noted.

Rule 231 reads:

"The engine bell must be rung on approaching every public road crossing or grade crossing, and until it is passed."

By Col. NOLAN.—The plaintiff rests.

By Mr. WALLACE.—I will make an objection on the ground that the proof does not show that this was a public crossing.

By the COURT.—Objection overruled; defendant's exception noted.

Defendant's Case.

[Testimony of David E. Garland, for Defendant.]

DAVID E. GARLAND, called, sworn as a witness of [37] defendant, testified:

Direct Examination.

I live at Tacoma, Washington. Am assistant yardmaster for the Chicago, Milwaukee & Puget Sound Railway Company. Remember the occasion of this

(Testimony of David E. Garland.)
accident, I had charge of the switch engine; I was employed as engine foreman; or foreman of the crew which works with the engine. That crew consists of two helpers, myself, the engineer and the fireman. Just before this accident, we were engaged in weighing one car, and putting it into the Great Northern transfer, upon a track whereat there was scales, west of this crossing. The head block of the Great Northern transfer was west of the crossing. The first switch westward of the road crossing on which the team was traveling, is at the point marked "M" on the map, that opens the track for the receiving and delivering to the Great Northern Railroad. This track scales were located on No. 1 track, No. "B" here. Had hold of one car, had weighed it, and after weighing it, come down headed east over the switch, next west of the crossing, just barely went over the crossing. I had a field man and an engine follower; my man following the engine dropped off at the switch, and I cut the car off at this switch "M." The switch-stand was on the south side of the track. My engine follower was at the switch-stand, he had opened the switch; I was riding the rearmost footboard, on the rear of the engine-tank; I intended to cut the car out and kick it in, or start it back; the fieldman was riding it in, in order to stop it on the transfer at its proper point. After this switch at "M" was closed to the track I had come out on and opened to the transfer; I gave the engineer a kick signal to kick the *the* car back into the Great Northern transfer; I also gave [38] a go-ahead signal. I was

(Testimony of David E. Garland.)

facing him on the south side; he was looking back at me—on the south side looking back. On receiving that signal, he took the signal and kicked the car; he pulled the engine open,—gave the engine steam,—and the car naturally went west as far as it could go, after it got under headway, I gave him a signal to go ahead. I gave the signal to go ahead with one hand, and uncoupled the car with the other hand, and he reversed the engine so that the engine started the other way. I knew nothing of the accident until I seen Mr. Clark lying on the ground. The moment our engine hit the wagon, the engine came to a stop, and we saw this man lying on the ground. I went to the freight office as fast as I could and notified a doctor and the agent, Mr. McMillan, there. The injured man was taken to the freight-house by the two helpers on the engine. After the engine, on your signal, started to back west with this single car, to kick it in, did it come to a stop at all before it went the other way?

A. Well, of course, momentarily, not any longer than that. When I gave the signal to go ahead, he had barely cleared the street crossing; the bell was ringing all of the time.

Cross-examination.

The engineer was Mr. Casey; the fireman was Charley Olsen. I left the employ of the Northern Pacific, October 19th, 1908. Had been foreman of the yard crew, before this injury occurred five years,—since October 3d, 1903. Just before we got to this crossing, we started from the scales on this track

(Testimony of David E. Garland.)

"B" here; the engine was headed east and the car was on the west end of it, behind it. When we pulled off the scales I was facing east,—facing the engineer, and on the footboard between the rear of the engine and the [39] car, we went over the switch far enough to throw it. We came on the crossing, but not across it. From the crossing to the point where the switch deflects is about one hundred feet. We desired to place the car on track "C," the receiving track of the Great Northern; the car was behind the engine all of the time,—on the west end of the engine.

Q. In sending the box-car back into the switch, the engine came back how far?

A. I should judge fifty or sixty feet,—seventy feet, probably. I said the engine and car was on the crossing, yes, sir, but not over the crossing. At the time I came to a standstill on the crossing, before there was any backing up of the car at all, the engine was completely over the crossing, but the car was on the crossing; it may be that the footboard of the engine was about on the extreme east end of the crossing,—that is, the footboard of the tank; you would have got east a car-length to give us room to throw the switch. They don't stop the engine, you know, just right at the time you give the signal; they can't stop immediately; they run a certain distance, perhaps a car-length. I didn't see the plaintiff when he was injured or before. The bell was constantly ringing. The switch was turned by the man following the engine; he was on the footboard

(Testimony of David E. Garland.)

with me, until he got off; his name was Ed. Willett. I don't know where he is now. After he turned the switch, I gave the signal to the engineer, who was on the right-hand side, same side as the switch-stand; I took the pin out to uncouple the car from the engine; did not get on the ground to do that. When I gave him the kick signal, he put on a big head of steam, and started west at perhaps four miles an hour. I still kept on the footboard; didn't get off at all; the engine went a distance of about fifty or sixty feet. I [40] gave the signal to go forward, after I had the car cut off.

Q. And he got off the crossing, did he, or do you know?

A. I am not positive, but if he did he barely cleared the crossing. The engine came to a standstill, you might say, momentarily; he put the engine over on a full; he reversed her from back up to go ahead almost under a full head of steam; it would be just momentarily. I don't know whether the engineer saw this man there with a wagon, or not. I didn't get off the footboard at all until we came up and found this man. I was standing on the right-hand side, on the end. After we weighed the car, the fireman started to ring the bell, and continued to ring it until after this accident happened. The engine was going at the time that it got to the crossing, when this collision occurred, three miles an hour; he had just got the engine over and made a couple of exhausts. There wasn't any noticeable stopping of the engine at all.

(Testimony of David E. Garland.)

Q. It would have to stop to go back and then forward? A. Yes, sir.

When I seen the blood coming out of his head, I made right for the freight depot, to make a report and notify a physician. I notified the agent, and I heard him notify Dr. Campbell. I saw the plaintiff brought into the freight-house on Arizona Street. The wagon wouldn't stop that engine, hardly; the engineer stopped the engine as quick as he ascertained there was trouble ahead. The engineer could have seen the crossing from the cab of his engine.

Redirect Examination.

Q. Mr. Garland, could the engineer, from his position on the seat box in the cab, see over immediately on the left side of the engine at the crossing?

A. No, sir. The left side would be the north side. I pulled the pin not when I gave the first signal to kick [41] back, but when I gave the second signal to go ahead.

Recross-examination.

I said I pulled the pin with my left hand and gave the signal with my right hand.

Q. You said to Mr. Wallace that as the engineer was there close to the track, and being on the right side of the engine, that he could not see across *across* on the other side and see the wagon there?

A. I did not.

Q. Well, how far back from the crossing would he have to get so that he would be able to see a wagon within ten or fifteen feet of the track?

(Testimony of David E. Garland.)

A. He would have to be back about eighty feet, clear of the crossing,—about two car-lengths.

[Testimony of William Casey, for Defendant.]

WILLIAM CASEY, sworn as a witness of defendant, testified as follows:

Direct Examination.

My age is twenty-eight; business, locomotive engineer. Live at Livingston. On the occasion of this accident, I was running that switch engine; Charley Olsen was my fireman; since I have seen him is about three of four years. My switch foreman was Mr. Garland. Immediately before the accident, was weighing a Great Northern Car, on the scale track in the upper yard; had just the one car. After weighing it we went east having engine and the one car. The switch foreman was on the hind footboard between the tank and the car. I took all the signals from him, in the forward movement; went east on the Great Northern switch there. The tank just about got over the east wagon track on the crossing; the car was still on the crossing; stopped on the foreman's signal; the engine bell had been ringing prior to stopping. [42] After thus stopping, I waited for a signal from the foreman to back up. The signal told me to kick the car, otherwise, to give a full head of steam. I came forward eastward with the engine; I did not see anything of the plaintiff of the wagon or team he was driving. On receiving this signal from the switch foreman to kick back, I put it in backward motion and gave her

(Testimony of William Casey.)

steam; the effect of that was to back. I backed west of the crossing. When I stopped it just about cleared the west wagon track of the crossing,—not over a foot. I didn't go farther on westward, because I got a stop signal from the foreman. He was on my side on the back footboard,—the right side. After receiving this stop signal from the switch foreman, I received a go-ahead signal, after I kicked back, and I reversed my engine, and with the effect of that, I started ahead with a forward motion; the car kept going back. The head switchman was on the car that ran back, and one at the switch. This switch was on the south side,—right side. It came to a stop as the result of my changing the lever, I should judge a second, and then started eastward again. Down to this time I hadn't seen anything of plaintiff, or his wagon or his team. The fireman had just got down to put in a fire,—that is, down on the deck. The act of throwing the lever over would cause the bell to ring for probably a minute or a minute and a half, because of the sudden jar of the engine, the sudden starting up on reversing. The first I saw was the horse that went ahead of me; I saw it right ahead of the engine, so close that I couldn't stop; I done everything I could to stop; the horses came into sight, south of and about right under the boiler. In my effort to stop I reversed the engine and gave her a full head of steam, and gave her all the air I could. **[43]**

Q. Was there anything more you could have done?

A. No, sir. I hit the wagon then. Myself and

(Testimony of William Casey.)

fireman and the switchman went down and picked him up and put him in the engine, and took him up to the freight depot. When I put him in the switch engine, I asked him what he was trying to do; he said he did not think I was so close to him. The day was clear and daylight. When I last saw Clark they were take*n* him out of the engine at the freight-house. I examined the place of the accident and the tracks of his wagon after the collision; after I took him to the freight-house I came back and examined the ground and the tracks, and the wagon track showed a circle away from the engine and east of the crossing,—that is, toward the east, but on the crossing. There was one wheel wagon track off the track east of the crossing,—of the wagon crossing; they were curving toward the east.

Cross-examination.

The engine bell was ringing at the time of the collision; and it was due to the fact that I suddenly reversed the engine.

Q. And that was what caused the ringing of it?

A. No, sir. It would cause it, but it didn't cause it then; the fireman was ringing it; he pulled the bell, and when you pull the bell it will ring two or three minutes of its own accord.

Q. When did he pull the cord before that?

A. Going both ways over the crossing. In going west over the crossing he started to pull that bell four or five times; he rang it when we got to the scales; and we weighed the car and started off the scales, and he started ringing the bell; he was con-

(Testimony of William Casey.)
stantly pulling the cord after we left the scales, [44] and when we got over the switch and backed down and kicked that car the bell was still ringing; and when I started to go east, he went down to the fire, and when I stopped it was still ringing; it was ringing all the time, only when we were weighing the car. From the scales to the crossing is,— perhaps, 100,— 125 feet. The bell was constantly ringing over every crossing, it did with me. As I got within about 100 feet from the crossing, I looked to see whether there was anything on the crossing, or beside the crossing. If there was a man with a team about ten or twelve feet away from the track, I could have seen him, if on my side, yes, sir. As I looked out of the cab window, a distance of eighty feet ahead, could see a wagon on either side of the crossing; there wasn't anybody there. In going to a crossing I am always careful, lest there might be somebody on there; that crossing was known to me, as being generally used. When I was within eighty feet of the crossing, I didn't see any wagon; I am sure that I looked. A team could go quite a ways from the time you would go eighty feet up this way, reverse your engine, kick that car back, and reverse your engine and start it this way again. At a short distance, within eighty feet, I would have some difficulty in seeing the wagon, if on the fireman's side. The fireman could see the wagon to an inch if he were looking out. Unless the fireman was looking out for a distance of eighty feet, going toward the crossing, I could not protect a fellow who was cross-

(Testimony of William Casey.)

ing there, at all. Would have to depend upon the fireman to advise whether any person was getting upon the track; the fireman didn't tell me there was any wagon standing there. I hadn't made any examination of that ground before that day, before eleven o'clock. You could tell whether there was another wagon went by there or not; the way this wagon laid, no wagon could **[45]** come in there to make the track. It had to be between the rails; it went over the rails, and off the crossing. I didn't see the wagon at all until I was just going to strike it. When I did see the wagon, the horses were just over the rails; the front wheels of the wagon were just about on the rails. I struck the wagon very close to the center. I seen Clark on the ground first. At the time I got the signal to go ahead, the front footboard of the engine cleared the wagon track, perhaps a foot,—not much more. The front footboard of the engine was about a foot west of the west wagon track on the crossing. Whether anybody was going over that crossing, I could not see. The fireman was putting in the fire. I could see on my side, could see that there was nothing on the track, unless somebody drove right up around the front of the engine. If they started to go ahead, right in,—cross right ahead of me*u*; you couldn't see them until the horses got on the south rail. The crossing was not clear; I was occupying the crossing at the time; I didn't clear the crossing. After I started on the reverse, before I struck the wagon, I didn't go but a very short ways; I don't believe I went over

(Testimony of William Casey.)

thirty feet,—twenty-five or thirty; I had no more than put my engine over when I hit the wagon. My engine had to come to a standstill, and in moving forward, I knew I was going to go; I had struck a speed, when I struck the wagon, between three and four miles an hour; after I struck the wagon I didn't go over ten feet. It takes time to stop a light engine. With the application of all the stopping power you had, you couldn't stop it in less than ten feet. You haven't got an awful lot of braking power on an engine, without any cars behind it, like you have with the cars behind it, with the air. From the road crossing to the switch-stand was about fifty or sixty feet. My purpose [46] in examining the wagon track was just to see where he went. We have to make out our Form 31, whether we hit him on the crossing, or whether he was off the crossing. I made the report that he was off the crossing practically. The fireman was there and looked over the ground with myself. When I came along on this scale track with this box-car behind the engine, I saw the crossing then, and looked at it, and kept looking at it until we were within eighty feet, when I could not any longer see it. The engine went over the crossing, then I got a signal to back up. The switch tracks have a little grade, not very much. You would have to cross another switch from this track before you got on the track of the Great Northern, before you could kick it in over there and clear. I gave it a kick sufficiently strong to get it back there. Had a wild idea of the distance; I kicked several

(Testimony of William Casey.)

cars in there. We didn't get very far from the switch-stand, maybe a foot or a foot and two inches from the west wagon track of the crossing. I don't know just exactly how far it is from the crossing to the switch; I can see it on my side. You couldn't see the horses coming from the other side, until they got on a direct line with the side of the boiler,—you couldn't look around the curve of the boiler and see them coming; you could see it when it got opposite the rail, not before, if they was close to the engine, perhaps five or six feet. Am working for the company now, have been continuously since this accident; am running a freight engine on the main line.

[Testimony of S. C. Ashby, Jr., for Defendant.]

S. C. ASHBY, Jr., sworn as witness of defendant, testified as follows:

Direct Examination.

I am the claim agent stationed here. You requested me to look up the rumor about the presence of the fireman. [47] I went to the roundhouse foreman this morning, and the time-keeper, to find out if here was a man in the employ of the company here by the name of Charley Olsen, and as near as I could find out, he had not been around here for two years.

Cross-examination.

Q. Where was it that you got the information that Mr. Olsen was here?

A. Mr. Wallace told me this morning. The only

(Testimony of William Wallace, Jr.)
thing that I did in connection with this case was simply to hunt Olsen.

[Testimony of William Wallace, Jr., for Defendant.]

WILLIAM WALLACE, Jr., sworn as a witness of defendant, testified:

I am an officer of the defendant railway company, —its division counsel for Montana. I had to do with the preparation of trial of this case for the several occasions when it was necessary to get ready for trial. I have made earnest efforts on every occasion to get the fireman, Charles Olsen. I find that as early as November 29th, 1910, I called upon the General Counsel at St. Paul, to try and locate Charles Olsen, together with other witnesses, and to have him with other witnesses, report to my office on the afternoon of December 5th. I am using my file for a copy of the telegrams. I also find that I advised of the continuance of this case on December 2d, to the general claim agent, and that at that time I asked him not to let up on efforts to locate either Garland or Olsen, that at least one of these men would be needed, and I confirmed that by letter on December 17th last; as the result of that effort, I was advised and learned from the general claim agent of the defendant company, who is the source through which witnesses not available here, that cannot be located here, are sought for, that they had not been able to locate Charles Olsen, [48] and they doubted very much if they would be able to do so. On the 19th day of May of this year, I called

(Testimony of William Wallace, Jr.)

upon the division superintendent, who undertakes to look up witnesses needed for trial where they are locally available,—the division superintendent of this division,—and I called then for witnesses, among others the fireman, Charles Olsen; and on the 20th of May I was advised by the division superintendent that one of the witnesses called for would report, and that fireman Olsen was out of the service and his whereabouts unknown, and the whereabouts of another witness was given. And because I had been unable to secure him by efforts locally, on the 26th of May of this year I again wired the general claim agent at St. Paul, asking him to furnish one of the witnesses shown to be by the division superintendent out of the state, and asking him also to endeavor to locate fireman Olsen and produce him at the trial. I was not able to get any results at all, and as soon as I heard this rumor spoken of here on the stand, as to the possible appearance of Olsen in the State, I at once made an effort to investigate that, and with that result.

Cross-examination.

I don't know of anything more that I could do; I exhausted my resources, so far as I know, Colonel. Garland, I got as explained, got his address through the division superintendent. The information that Olsen had strayed into town, I think I got the night before last, from Mr. Garland, who had heard Mr. Casey say so.

Q. But you didn't move the agencies to locate him until this morning, did you?

(Testimony of William Wallace, Jr.)

A. It was Sunday, and I could not reach the claim agent until this morning. [49]

[Testimony of John Oies, for Defendant.]

JOHN OIES, sworn as witness of defendant, testified:

Direct Examination.

My home is at Livingston; am a civil engineer, in the service of the railway company. I got here from Butte last night. Was over there at your request about this crossing; had been over there about a week ago first. Yesterday I went to a road crossing, that just south of the southeast corner of the Big Blackfoot Milling Company's fence, that leads over the track there; it is about 600 feet southeast of the old freight-house. That scale track takes off about twenty feet from the center of the road crossing; there is planking at that road crossing. It is eight feet from the switch to the west end of the planking; this is the first switch west of that crossing. The planks there are sixteen feet. The distance down to the scales, of the scale track that runs out of that switch, from the switch to the scales, is 336 feet.

Cross-examination.

From the crossing to the scale track there is one track in between there; it is twenty feet from the center of the crossing. The track east of the crossing runs beyond the crossing; and the switch on which the scale is branches off that, about twenty feet from the center of the crossing. There are two tracks west of the crossing, and the farther*e*st one

(Testimony of John Oies.)

north the other switch is taken off, but between the switch twenty feet west of the crossing, and the scale, there is no switch on the track. North of the scale track a switch is taken off of that track about one hundred feet west of the crossing, and running to the north of the scale track. The track east of the crossing runs quite a distance to the east; that is the only track there on which there are [50] any scales. From the switch to the scales is 336 feet.

Redirect Examination.

This northward track, I think, is a lead track. There is no switch taken off between the scales down here and the head block, that switch letting into the scale track. This other switch taken off about one hundred feet from the crossing takes off from this northernmost track, and goes in between the scale and the other. The switches taken off of the north track are both to the westward of the switch that splits the track for the scale track and the north lead.

Rebuttal.

[Testimony of Thomas Clark, for Plaintiff (in Rebuttal).]

THOMAS CLARK, recalled, testified:

Direct Examination.

When I stopped there to permit the train to pass, the train was east of this crossing. When I made the crossing there, my wagon didn't get off the planks; I didn't make any wheel marks off the planks and between the rails.

Q. There is also some evidence here that when

(Testimony of Thomas Clark.)
you were taken on the engine, after being injured, you made the statement, "I did not think you were so close."

A. It would have been impossible; I was unconscious and knew nothing about it.

Evidence closed. [51]

[Motion for a Directed Verdict, etc.]

Immediately upon the close of the evidence, defendant made and filed its written motion for a directed verdict, which motion is as follows:

"Comes now the defendant Northern Pacific Railway Company, at the close of all the evidence, moves the Court to direct a verdict in its favor, because the uncontradicted evidence shows that the plaintiff was guilty of contributory negligence proximately causing his injury, in this: That he knew he was in the switch yards of this defendant, was thoroughly familiar with the crossing, and the regulations of the switch im*mde*iately west thereof, knew that this was a switch engine, engaged in the work of moving cars within the yard, stopped beside the track to let it pass westward, saw it come to a stop within a very few feet of the crossing, and knowing, or in the exercise of reasonable diligence being bound to have known, that the switch engine, after stopping, might, whether it used this switch or otherwise, go again in the opposite direction, and without getting any signal to cross, or waiting to see which way the engine should start, or making any inquiries of anyone about the train, he starts to cross in front of the engine, and either does not observe to notice that

it has started back towards him, or observing it, endeavors to cross ahead of it, and is struck and injured; and that, at all of said times, the view was wholly unobstructed, and the engine constantly within his view, had he chosen to have looked.

II.

There is no sufficient averment to warrant submitting the question of 'The last clear chance,' in that there is no averment that the striking of the wagon could have been avoided by the exercise of reasonable care, at any time after it was known he was either in or approaching a position of peril; or any averment that in the exercise of reasonable care, he should have been seen in peril sooner than he was.

III.

There is no evidence to warrant submitting the question of the last clear chance to the jury, in that there is no proof that after he had started to cross the track, he was either seen by anyone in control of the engine, or who could have warned such person, until his horses appeared in the engineer's view on the track, or that in the exercise of reasonable diligence he should have been sooner seen; and the evidence is uncontradicted that thereafter everything was done that could have been done to have averted the accident, but without avail.

IV.

The evidence shows uncontradictedly that the negligence of the plaintiff was operating to the very moment of the accident, in that he failed to watch the engine at all from the moment it stopped just west of the crossing, until just the instant before it

hit his wagon." [52]

And after argument the said motion was by the Court overruled, to which ruling of the Court defendant then and there duly excepted.

[Defendant's Exceptions to Charge, etc.]

Thereupon and in due season, defendant excepted to portions of the charge of the Court, as *give,* for reasons respectively as follows:

(1) To that portion on page 3 of the charge reading: "While it was incumbent upon the defendant company in running the engine forward, and in the direction of the plaintiff, to give warning of its approach by ringing the bell," etc., and also that portion on page 4, reading, "whether the defendant was negligent in the respect charged in the complaint depends, under the evidence, on whether the engine bell was rung before the engine started," etc., for the reason that under the facts of this case, there being a continuous switching operation to, past and back over the crossing, there was no such obligation. This objection was by the Court overruled and defendant duly excepted, and its exception was duly noted by the court in its minutes.

(2) To that portion of page 5 reading: "So the burden of proof to show contributory negligence on the part of the plaintiff is upon the defendant," etc., because this case involves an exception to the rule above stated, in this, that the plaintiff himself started the team from a place of safety, and drove onto the track, and into a place of danger, and the burden was upon him to allege and show, that in so doing he acted with reasonable care. This was overruled and

defendant duly excepted and its exception was then and there, by the Court, noted in its minutes.

[Instructions Requested by Defendant, etc.]

The defendant duly requested in writing the following instruction, D–8: [53]

"The pleading in this case only charges that the accident could have been prevented by the exercise of reasonable care, and that the employees of defendant saw plaintiff's peril. There is no allegation that in the exercise of reasonable care they could have sooner seen his peril than they did actually see him upon the tracks, if it was there they first saw him after he had started his team from the standing position north of the tracks, and for this reason also you will have nothing to do with the question of when they ought to have seen him in peril, but only when and where those in control of the engine actually did see him in peril."

The Court refused the same, and defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court's charge to the jury; this exception was also duly noted by the Court in its minutes.

The defendant duly requested in writing the following instruction, No. D–7:

"Even if you find from the evidence that defendant's engineer might, after discovering plaintiff's peril by the exercise of reasonable care in the use of his appliances at his command, have avoided striking the wagon and injuring the plaintiff, nevertheless, if you also find from the evidence that the

plaintiff himself by a reasonably careful observation of the engine, either at the time or after he started to drive across the tracks in front of it, might have avoided injury to himself and avoided the collision or the injurious consequences thereof to himself, but that in fact he did not observe the engine after it had stopped [54] and until just about the moment it was striking his wagon on the crossing, though in the exercise of due care he should have looked at the engine to see which way it was going to move, and if it was going to move at all, then because this lack of care on his part was operating to the very last moment, the question of whether defendant could or could not have avoided striking plaintiff after discovering his peril would become immaterial and your verdict must then be for the defendant."

The Court refused the same, and the defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court's charge to the jury; this exception was also duly noted by the Court in its minutes.

The defendant duly requested in writing the following instruction No. D–9:

"The plaintiff is not to be permitted to speculate or guess upon his chance of getting across before the engine would start back towards him, nor to speculate on whether the engine if it did start would start towards him or in the opposite direction. He was bound to assume that the engine might start at any moment, and if he speculated upon the matter and

without any inquiry of the train crew or any signal by way of invitation, he went on the track and was struck, then he cannot recover and your verdict must be for the defendant."

The Court refused this instruction, and defendant duly excepted to such refusal of the Court, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court's charge to the jury; and this exception was also duly noted by the Court in its minutes. **[55]**

The defendant duly offered in writing the following instruction No. D–10:

"Because wagons may be stopped quickly, a train or engine has the preference at a crossing. It is the duty of the person in the wagon to wait for the train, and exercise reasonable diligence in and about the crossing."

The Court refused the same, and defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case and it was not elsewhere in the Court's charge to the jury given in terms or in substance; and this exception was also duly noted by the Court in its minutes.

Thereafter, and after argument by counsel, and upon being charged by the Court, the jury retired to consider of their verdict; on June 6, 1911, they returned the same in favor of plaintiff as follows:

(Here insert said Verdict.) See page 22.

Thereafter and on June 8th, 1911, the judgment was entered in favor of plaintiff and against the

defendant and in accordance with said verdict, in words and figures as follows:

(Here insert said Judgment.) See page 23.

And on June 6, 1911, by consent of counsel, the Court ordered that the time for preparing defendant's proposed bill of exceptions should be extended sixty days beyond the ten-day period prescribed by rule, or until August 14, 1911, inclusive, and here and now the defendant tenders the foregoing as its proposed bill of exceptions in the above-entitled action.

WM. WALLACE, Jr.,
JOHN G. BROWN,
R. F. GAINES,
Attorneys for Defendant. **[56]**

[Order Settling and Allowing Bill of Exceptions.]

And now on the 8th day of August, 1911, and within the time allowed by law and the orders of the Court, the plaintiff having announced that he did not desire to propose any amendments to said proposed bill as served, or desire any notice of the settlement thereof, and the same having been duly delivered to the Judge for settlement, and having been found correct, the same, consisting of the foregoing 31 pages, is hereby settled and allowed as and for a true bill of exceptions in this cause.

CARL RASCH,
Judge of said Court.

[Indorsed]: Title of Court and Cause. Bill of Exceptions. Filed Aug. 8, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. **[57]**

And thereafter, to wit, on October 4, 1911, defendant filed its assignment of errors herein, being in the words and figures following, to wit: [58]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to wit:

I.

The Court erred in overruling defendant's objection made at the close of plaintiff's case to the failure of plaintiff to prove that the crossing where the accident occurred was a public crossing.

II.

The Court erred in denying defendant's motion for a directed verdict in its favor, made at the close of all the evidence.

III.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff.

JOHN G. BROWN,
R. F. GAINES,
WM. WALLACE, Jr.,
Attorneys for Defendant.

Due personal service of within assignment of errors made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plaintiff.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [59]

And thereafter, on Oct. 4, 1911, defendant filed its petition for writ of error herein, being in the words and figures following, to wit: [60]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Petition for Writ of Error.

Northern Pacific Railway Company, defendant in the above-entitled action, feeling itself aggrieved by the judgment of this Court made and entered in the above-entitled action on the 8th day of June, 1911, in favor of the plaintiff for the sum of seven hundred and eighty ($780.00) dollars, together with said plaintiff's costs and disbursements incurred in said action, comes now by Wm. Wallace, Jr., John G. Brown and R. F. Gaines, its attorneys, and petitions

the Court for an order allowing the said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also asks that an order be made fixing the amount of security the defendant shall give and furnish upon the said writ of error.

WM. WALLACE, Jr.,
JOHN G. BROWN,
R. F. GAINES,
Attorneys for Defendant.

Due personal service of within petition for writ of error made and admitted, and receipt of copy thereof acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plaintiff. [61]

[Indorsed]: Title of Court and Cause. Petition for Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [62]

And thereafter, to wit, on October 4, 1911, an order allowing writ of error was duly made and entered herein, being in the words and figures following, to wit: [63]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Order Allowing Writ of Error, Etc.

At a stated term, to wit, April Term, 1911, of the Circuit Court of the United States of America, Ninth Circuit, in and for the District of Montana, held at the courtroom in the city of Helena, State of Montana, on the 4th day of October, 1911; present, the Honorable Carl Rasch, District Judge:

Upon motion of Wm. Wallace, Jr., John G. Brown and R. F. Gaines, attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be, and is hereby, allowed for a review in the United States Circuit Court of Appeals, for the Ninth Circuit, of the judgment heretofore entered in this cause, and that the amount of bond on the said writ be and the same is hereby fixed at the sum of Two Thousand Dollars, which bond, when given and approved, shall

operate as a supersedeas.

CARL RASCH,
District Judge.

Due personal service of within order made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plff.

[Indorsed]: Title of Court and Cause. Order for Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. **[64]**

And thereafter, on Oct. 4, 1911, Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit: **[65]**

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,
Plaintiff,
vs.
NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that the Northern Pacific Railway Company, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto Thomas Clark, the plaintiff above named, in the sum

of Two Thousand Dollars, to be paid to the said Thomas Clark, his heirs, legal representatives, or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our successors or assigns, firmly by these presents.

Sealed with our seals, and dated this 4th day of October, 1911.

Whereas, the above-named defendant, Northern Pacific Railway Company, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled action, by the Circuit Court of the United States, in and for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railway Company shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,

By WM. WALLACE, Jr.,

Its Division Counsel.

[Corporate Seal]

NATIONAL SURETY COMPANY,

By J. P. DONNELLY,

Its Attorney in Fact Hereto Duly Authorized.

The foregoing bond and surety approved this 4th day of October, 1911, and supersedeas ordered.

CARL RASCH,

District Judge.

[Indorsed]: Due personal service of within bond made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plaintiff.

Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [66]

And thereafter, to wit, on Oct. 4, 1911, a Writ of Error was duly issued herein, which said Writ is hereto annexed and is in the words and figures following, to wit: [67]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Honorable Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Circuit Court, before you or some of you, between Thomas Clark, plaintiff, and Northern Pacific

Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, and plaintiff in error, Northern Pacific Railway Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 3d day of November, 1911, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [68] that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 4th day of October, in the year of our Lord, 1911.

[Seal] GEO. W. SPROULE,
Clerk of the United States Circuit Court, for the Ninth Circuit.

The above writ of error is hereby allowed by,

CARL RASCH,
District Judge. [69]

Answer of Court to Writ of Error [Original].

The Answer of the Honorable, the Circuit Judges of the United States, Ninth Circuit, District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said Circuit Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk. [70]

Due personal service of within Writ of Error made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plf.

[Endorsed]: No. 836. In U. S. Circuit Court, 9th Circuit, District of Montana. Thomas Clark, Plaintiff, vs. Nor. Pac. Ry. Co., Defendant. Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. ———— Deputy.

And thereafter, to wit, on October 4th, 1911, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [71]

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

Citation [Original].

United States of America,—ss.

To Thomas Clark, Plaintiff and Defendant in Error, and to A. C. McDaniel, and Walsh & Nolan, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a cession of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein Northern Pacific Railway Company is plaintiff in error, and Thomas Clark is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable CARL RASCH, Judge of the United States District Court for the District of Montana, presiding in the Circuit Court of the United States, for the District of Montana, this 4th

day of October, 1911, and of the Independence of the United States, one hundred and thirty-fifth.

CARL RASCH,
District Judge. [72]

Due personal service of within Citation made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,
WALSH & NOLAN,
Attorneys for Plaintiff.

[Endorsed]: No. 836. In U. S. Circuit Court, 9th Circuit, District of Montana. Thomas Clark, Plaintiff, vs. Nor. Pac. Ry. Co., Defendant. Citation. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. ————, Deputy. [73]

[Certificate of Clerk U. S. Circuit Court to Record, etc.]

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 74 pages, numbered consecutively from 1 to 74, inclusive, is a true and correct transcript of the pleadings, process, orders and judgment, and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I further

certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty-nine 60/100 Dollars ($59.60), and that the same have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 21st day of October, A. D. 1911.

[Seal] GEO. W. SPROULE,
Clerk. [74]

[Endorsed]: No. 2056. United States Circuit Court of Appeals for the Ninth Circuit. The Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Thomas Clark, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Montana.

Filed October 25, 1911.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 2057

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE TOWNE PATENT STEERING WHEEL COMPANY, a Corporation,

Appellant,

vs.

DON LEE,

Appellee.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

No. 2057

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE TOWNE PATENT STEERING WHEEL COMPANY, a Corporation,

Appellant,

vs.

DON LEE,

Appellee.

Transcript of Record.

Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

FILMER BROS. CO. PRINT. 330 JACKSON ST., S. F., CAL.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

FREDERICK S. LYON, Esq., Merchants' Trust Building, Los Angeles, California.

For Appellee:

HENRY T. HAZARD, Esq., Citizens' National Bank Building, Los Angeles, California.

CASSELL SEVERANCE, Esq., Citizens' National Bank Building, Los Angeles, California.

[Citation (Original).]

UNITED STATES OF AMERICA,—ss.

To Don Lee, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 4th day of November, A. D. 1911, pursuant to an order allowing an appeal, entered in the Clerk's office of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, in that certain Action Number 1597, wherein the Towne Patent Steering Wheel Company is complainant and appellant, and you are defendant and appellee, to show cause, if any there be, why the Decree rendered against said appellant, in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable OLIN WELLBORN, United States District Judge for the Southern District of California, and one of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 7th day of October, A. D. 1911, and of the Independence of the United States, the one hundred and thirty-sixth.

OLIN WELLBORN,

U. S. District Judge, for the Southern District of California.

Due service and receipt of a copy of the within citation is hereby admitted this 9th day of October, 1911.

HENRY T. HAZARD,
CASSELL SEVERANCE,
Solicitors and of Counsel for Defendant.

[Endorsed]: No. ——, United States Circuit Court of Appeals for the Ninth Circuit. Towne Patent Steering Wheel Company, Appellant, vs. Don Lee, Appellee. Citation. Filed Oct. 11, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States, for the Ninth Circuit, in and for the Southern District of California, Southern Division.

Towne Patent Steering Wheel Company, a corporation, organized and existing under and by virtue of the Laws of the State of California, and having its principal place of business in the city of Los Angeles, California, brings this its Bill of Complaint against Don Lee, a resident and citizen of Los Angeles, California, and thereupon complaining shows unto your Honors:

I.

That heretofore, to wit, prior to November 8th, 1906, one William F. Towne, of Los Angeles, California, was the original, first and sole inventor of a certain new and useful Steering Wheel for Auto-vehicles, not known or used by others before his [2*] invention or discovery thereof, or patented or de-

*Page-number appearing at foot of page of original Certified Record.

scribed in any printed publication in the United States of America or any foreign country before his invention or discovery thereof, or more than two years prior to his application for Letters Patent thereon in the United States of America, or in public use or on sale in the United States of America for more than two years prior to said application for Letters Patent therefor and not abandoned.

II.

That the said William F. Towne, so being the original, first and sole inventor of said Steering Wheel for Autovehicles, heretofore, to wit, on November 8th, 1906, made application in writing in due form of law to the Commissioner of Patents in accordance with the then existing laws of the United States made and provided, and complied in all respects with the conditions and requirements of said laws, and simultaneously with the making of such application by the said William F. Towne for the said Letters Patent, the said William F. Towne did by an instrument in writing in due form of law, duly signed by the said William F. Towne, and delivered by him to one Charles R. Sumner, of Los Angeles, California, the said William F. Towne did sell, assign, transfer and set over unto the said Charles R. Sumner, an undivided one-half (½) part of the entire right, title and interest in and to the said invention and the Letters Patent to be granted and issued therefor, and did authorize and request the Commissioner of Patents to issue the said Letters Patent jointly to the said William F. Towne and said Charles R. Sumner, their heirs and assigns; that said

instrument in writing was duly and regularly recorded in the United States Patent Office; that thereafter such proceedings were duly and regularly had and taken in the matter of such application that, to wit, on March 26th, 1907, Letters Patent of the United States of America [3] numbered 848,140 and bearing date the 26th day of March, 1907, were duly and regularly granted and issued by the Government of the United States to the said William F. Towne and Charles R. Sumner, whereby there was granted and secured to the said William F. Towne and Charles R. Sumner, their heirs, legal representatives and assigns, for the full term of seventeen (17) years from and after the 26th day of March, 1907, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof; that the said Letters Patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the acting Commissioner of Patents, all as will more fully and at large appear from said original Letters Patent or a duly certified copy thereof which are ready in court to be produced by your orator; and that prior to the grant and issuance and delivery of said Letters Patent all proceedings were had and taken which were required by law to be had and taken prior to the issuance of Letters Patent for new and useful inventions.

III.

You orator further shows unto your Honors that by an instrument in writing in due form of law,

signed by the said William F. Towne and Charles R. Sumner, and by them delivered to your orator, the said William F. Towne and Charles R. Sumner did sell, assign, transfer and set over unto your orator the full and exclusive right, title and interest in and to the said Letters Patent and all rights and privileges thereby granted and secured, together with all rights of action, claims or demands arising out of or accruing from the said Letters Patent in any manner whatsoever, including all claims for damages and rights of action growing out of past infringement thereof, if any; and your orator is now the sole and exclusive owner thereof and of all rights thereunder. [4]

IV.

That the said invention so set forth, described and claimed in and by said Letters Patent No. 848,140, aforesaid, is of great value and has been extensively practiced by your orator and your orator's assignors and licensees, and that since the grant, issuance and delivery of said Letters Patent the said Steering Wheel for Autovehicles have gone into great and extensive use and your orator and your orator's assignors, and the licensees of your orator and of your orator's assignors have sold large numbers thereof, and upon each and every one of the Steering Wheels for Autovehicles so manufactured, used or sold by your orator, your orator's assignors, or the said licensees, as aforesaid, the word "Patented" together with the day and date of the issuance of said Letters Patent, to wit, March 26th, 1907, has been marked and stamped thereon, thereby

notifying the public of the said Letters Patent; and the said defendant has been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of said Letters Patent No. 848,140 and of the rights of your orator thereunder, and demand has been made upon him to respect the said Letters Patent and not infringe thereon, but notwithstanding such notice the defendant has continued to make, use and sell Steering Wheels for Autovehicles embodying the said invention, as hereinafter more particularly set forth.

V.

And your orator further shows unto your Honors that the trade and public have generally respected and acquiesced in the validity and scope of the said Letters Patent No. 848,140 and in the exclusive rights of your orator and of your orator's assignors therein and thereunder, and save and except for the infringement thereof of defendant, as hereinafter set forth, your orator and your orator's assignors and licensees have had and enjoyed [5] the exclusive right, liberty and privilege since March 26th, 1907, of manufacturing, using and selling Steering Wheels for Autovehicles embodying and containing the invention described in, set forth and claimed in and by said Letters Patent No. 848,140, and but for the wrongful and infringing acts of defendant, as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator.

VI.

And your orator further shows unto your Honors that notwithstanding the premises, but well knowing the same, and without the license or consent of your orator, and in violation of said Letters Patent, and of your orator's rights thereunder, the defendant, Don Lee, has within the year last past, and in the Southern District of California, to wit, in the County of Los Angeles, State of California, and elsewhere, made, used and sold to others to be used, and is now making, using and selling to others to be used Steering Wheel for Autovehicles embodying, containing and embracing the invention described, claimed and patented in and by said Letters Patent No. 848,140, and has infringed upon the exclusive rights secured to your orator by virtue of the said Letters Patent, and that the Steering Wheels for Autovehicles so made, used and sold by defendant were and are infringements upon said Letters Patent, and each of said Steering Wheels for Autovehicles contains in it the said patented invention, and that although requested so to do defendant refuses to cease and desist from the infringement aforesaid and is now making, using and selling Steering Wheels for Autovehicles containing and embracing the said patented invention and intends and threatens to continue so to do, and will continue so to do unless restrained and enjoined by this Court, and is realizing as your orator is informed and believes, large gains, profits [6] and advantages, the exact amount of which is unknown to your orator, but upon information and belief your orator

alleges the same to be the full sum of Ten Thousand Dollars ($10,000.00); and your orator prays discovery of the said defendant the exact number of Steering Wheels for Autovehicles made, used or sold by defendant and the exact amount of profits and gains derived therefrom by defendant.

That for the wrongs and injuries herein complained of, your orator has no plain, speedy or adequate remedy at law, and is without remedy save in a Court of Equity where matters of this kind are properly cognizable and relievable;

To the end, therefore, that the said defendant, may, if he can, show why your orator should not have the relief herein prayed, and may, according to the best and utmost of his knowledge, recollection, information and belief, but not under oath, (an answer under oath being hereby expressly waived), full, true, direct and perfect answer make to all and singular the matters and things hereinbefore alleged, charged and set forth, and your orator prays that the said defendant may be enjoined and restrained, both provisionally and perpetually, from further infringement upon said Letters Patent and may be decreed to account for and pay over unto your orator the profits and gains realized by defendant from and by reason of said infringement aforesaid, and the damages suffered by your orator by reason thereof, together with the costs and disbursements of this suit.

May it please your Honors to grant unto *you* orator a Writ of Injunction issuing out of and under the seal of this Court, provisionally, and until the final hearing of this cause, enjoining and restraining the

said defendant, Don Lee, his agents, servants, employees, attorneys and associates, and each and every of them, from making, using and selling any Steering [7] Wheels for Autovehicles containing or embracing the said invention patented in and by the said Letters Patent, and that upon the final hearing of this case said provisional injunction be made final and perpetual, and that your orator may have such other and further or different relief as to your Honors may seem proper and in accordance with Equity and good conscience.

May it please your Honors to grant unto your orator the Writ of Subpoena of the United States issuing out of and under the seal of this Court directed to the defendant, Don Lee, commanding him by a day certain, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer this Bill of Complaint, and to stand to, abide by, and perform such other and further orders and decrees in the premises as to your Honors may seem meet.

And your orator will every pray.

TOWNE PATENT STEERING WHEEL COMPANY,

By F. W. TOWNE,
Its President.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant. [8]

United States of America,
Southern District of California,
County of Los Angeles,—ss.

William F. Towne, being first duly sworn, deposes and says; that he is the President of the Towne Patent Steering Wheel Company, the complainant in the within-entitled action; that he has read the foregoing Bill of Complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information or belief, and as to such matters he believes it to be true.

WILLIAM F. TOWNE.

Subscribed and sworn to before me this 2d day of December, 1910.

[Seal] FRANK L. A. GRAHAM,
Notary Public in and for Los Angeles County, State of California.

[Endorsed]: No. 1597. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Company, Complainant, vs. Don Lee, Defendant. In Equity. Bill of Complaint. Filed Dec. 2, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [9]

[Subpoena.]

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

IN EQUITY.

The President of the United States of America, Greeting, to Don Lee:

YOU ARE HEREBY COMMANDED, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Los Angeles, California, on the second day of January, A. D. 1911, to answer a bill of Complaint exhibited against you in said Court by Towne Patent Steering Wheel Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, California, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS, the Honorable JOHN M. HARLAN, Senior Associate Justice of the Supreme Court of the United States, this 3d day of December, in the year of our Lord one thousand nine hundred and ten and our Independence the one hundred and thirty-fifth.

[Seal] WM. M. VAN DYKE,
Clerk.
By Harry H. Jones,
Deputy Clerk. **[10]**

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED, to enter your appearance in the above suit, on or before the first Monday of January next, at the Clerk's Office of said court pursuant to said Bill; otherwise the said Bill will be taken *pro confesso.*

WM. M. VAN DYKE,
Clerk.
By Harry H. Jones,
Deputy Clerk.

Clerk's Office: Los Angeles, California.

United States Marshal's Office,
Southern District of California.

I HEREBY CERTIFY, that I received the within writ on the 7th day of December, 1910, and personally served the same on the 7th day of December, 1910, on Don Lee by delivering to and leaving with Don Lee said defendant named therein, personally, at the County of Los Angeles in said district, a copy thereof.

Los Angeles, Dec. 7th, 1910.

LEO V. YOUNGWORTH,
U. S. Marshal.
By B. H. Franklin,
Deputy.

[Endorsed]: Original. Marshal's Civil Docket No. 1604. No. 1597. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. Towne Patent Steering Wheel Co. vs. Don Lee, Subpoena. Filed Dec. 7,

1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [11]

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY—No. 1597.

TOWNE PATENT STEERING WHEEL CO.,
Complainant,

vs.

DON LEE,
Defendant.

Demurrer.

The demurrer of Don Lee, the defendant above named:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for causes of demurrer, shows:

1. That it appears by complainant's own showing by the said bill that it is not entitled to the relief prayed by said bill against the defendant.

2. That the claims made in said Letters Patent, numbered 848,140, dated March 26, 1907, as alleged in said complaint, show on their face the lack of patentable novelty.

3. That the said claims show by their express limitations that it is not new, to roughen the surfaces of steering wheels.

4. That the said letters patent in suit are invalid and void, because the improvements therein set forth lack invention and did not require the exercise of the inventive faculty. [12]

5. That the said claims in the said patent, are ambiguous, unintelligible and uncertain, in this: it is not described in the said specification and drawings, in such clear and exact terms as to enable anyone skilled in the art, to which the invention pertains to practise the invention; and particularly to distinguish it from the prior state of the art.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly prays the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

CASSELL SEVERANCE,
Solicitor for Defendant.

HENRY T. HAZARD,
EDWARD W. VAILL,
Of Counsel.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY T. HAZARD,
Of Counsel for Defendant.

United States of America,
Southern District of California,
County of Los Angeles,—ss.

Don Lee, being first duly sworn, deposes and says, that he is the above-named defendant, and that the

foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

DON LEE.

Subscribed and sworn to before me this 16th day of January, 1911.

[Seal] EARLE L. POLLARD,

Notary Public in and for the County of Los Angeles, State of California. [13]

[Endorsed]: Original. No. 1597. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Co., Plaintiff, vs. Don Lee, Defendant. Demurrer. Received Copy of Within Demurrer this 2d day of February, 1911. Frederick S. Lyon, Solr. for Complainant. Filed Feb. 2, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Cassell Severance, Solicitor for Defendant. Henry T. Hazard, Counsel for Defendant. [14]

[Order Sustaining Demurrer, etc.]

At a stated term, to wit, the January Term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the twenty-sixth day of June, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable OLIN WELLBORN, District Judge.

No. 1597.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

This cause coming on this day to be heard on defendant's demurrer to complainant's bill of complaint, Frederick S. Lyon, Esq., appearing as counsel for complainant, and Cassell Severance, Esq., appearing as counsel for defendant, and said demurrer having been argued in support thereof by Cassell Severance, Esq., of counsel as aforesaid for defendant, and in opposition thereto by Frederick S. Lyon, Esq., of counsel as aforesaid for complainant, it is now by the Court ordered, that said demurrer be, and the same hereby is, sustained; on motion of counsel for complainant, it is ordered, that complainant have thirty (30) days in which to amend its bill of complaint in case it shall be so advised.

[Endorsed]: No. 1597. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Towne Patent Steering Wheel Company, Complainant, vs. Don Lee, Defendant. Copy of Order Sustaining Demurrer. [15]

[Enrollment.]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1597.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

The complainant filed its bill of complaint herein on the 2d day of December, 1910, which is hereto annexed;

A subpoena to appear and answer in said cause was thereupon, on said 2d day of December, 1910, issued, returnable on the 2d day of January, 1911, which is hereto annexed;

The defendant appeared herein on the 2d day of January, 1911, by Cassell Severance, Esq., his solicitor, and Henry T. Hazard, Esq., and Edw. Vaill, Esq., his counsel;

The demurrer of defendant to complainant's bill of complaint, was filed herein on the 2d day of February, 1911, and is hereto annexed;

On the 26th day of June, 1911, the Court made and entered an order herein, sustaining the demurrer to the bill of complaint, a copy of which order is hereto annexed;

On the 8th day of September, 1911, on the motion

of counsel for defendant, the Court made and entered an order herein for a Final Decree in favor of defendant and against complainant, and accordingly on said 8th day of September, 1911, a Final Decree pursuant to said order was signed, filed, entered and recorded herein, and is hereto annexed. [16]

At a stated term of the Circuit Court of the United States, in and for the Southern District of California, Southern Division, held in the city of Los Angeles, California, on the 8th day of September, 1911. Present: Honorable OLIN WELLBORN, Judge.

IN EQUITY—No. 1597.

TOWNE PATENT STEERING WHEEL CO.,
Complainant,

vs.

DON LEE,
Defendant.

Decree.

This cause having come on to be heard upon the Bill of Complaint herein, and defendant's demurrer thereto, and after hearing Frederick S. Lyon, Esq., of counsel for complainant, and Cassell Severance, Esq., of counsel for defendant; and the Court after due consideration thereof, having on the 26th day of June, 1911, ordered that the demurrer be sustained, and having granted complainant thirty (30) days in which to amend his Bill of Complaint and the time to amend having now expired without the filing of an amended bill, on motion of defendant's solicitor;

It is ordered, adjudged and decreed, and the Court doth hereby order, adjudge and decree, as follows, to wit:

That the patent in suit, issued to William F. Towne and Charles R. Sumner, No. 848,140, March 26, 1907, is invalid and void on its face for want of patentable invention.

That no infringement as complained of in the said Bill of Complaint, is chargeable against the defendant, Don Lee. [17]

That the demand for an answer to the said Bill of Complaint, and an accounting of profits and damages, and the prayer for an injunction, provisional and perpetual, or any other relief, is denied the complainant herein.

That said complaint be and is hereby dismissed.

That the Towne Patent Steering Wheel Co., Complainant, herein recover nothing by this its action against Don Lee, the defendant herein.

And it is further ordered, adjudged and decreed that the defendant recover of the said complainant the costs and disbursements of this suit taxed at $35.10.

Dated at Los Angeles, California, this 8th day of September, 1911.

OLIN WELLBORN,
United States Judge.

Decree entered and recorded September 8th, 1911.

WM. M. VAN DYKE,
Clerk.
By John T. Goolrick, Jr.,
Deputy Clerk.

[Endorsed]: No. 1597. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Co., Plaintiff, vs. Don Lee, Defendant. Decree. Filed Sep. 8, 1911. Wm. M. Van Dyke, Clerk. By John T. Goolrick, Jr., Deputy Clerk. Cassell Severance, Solicitor for Defendant. [18]

[Certificate of Enrollment.]

Whereupon, said bill of complaint, subpoena, demurrer, copy of order sustaining demurrer to the bill of complaint, and said Final Decree are hereto annexed;—the said Final Decree being duly signed, filed and enrolled pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] WM. M. VAN DYKE,
Clerk.
By John T. Goolrick, Jr.,
Deputy Clerk.

[Endorsed]: No. 1597. In the Circuit Court of the United States, Ninth Judicial Circuit for the Southern District of California, Southern Division. Towne Patent Steering Wheel Company vs. Don Lee, Enrolled Papers. Filed September 8, 1911. Wm. M. Van Dyke, Clerk. By John T. Goolrick, Jr., Deputy Clerk. Recorded, Decree Register Book No. 3, page 447. [19]

[Petition for Order Allowing Appeal.]

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

The complainant in the above-entitled suit conceiving itself aggrieved by the decree made and entered by said Court in the above-entitled cause on the 8th day of September, 1911, dismissing complainant's Bill of Complaint in said suit, comes now, by Frederick S. Lyon, Esq., its solicitor and counsel, and petitions said Court for an order allowing it to prosecute an appeal from said decree dismissing said Bill, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the sum of security which complainant shall give and furnish upon such an appeal.

And your petitioner will ever pray.

FREDERICK S. LYON,

Solicitor and of Counsel for Complainant.

[Endorsed]: No. 1597. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Company,

Complainant, vs. Don Lee, Defendant. In Equity. Petition for Appeal. Filed Sep. 12, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [20]

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

Assignments of Error.

Comes now the complainant above named and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, upon the decree dismissing complainant's Bill of Complaint, which decree was made and entered in this court on September 8th, 1911:

1. The Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in dismissing said Bill of Complaint.

2. The Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in finding that the Towne

Patent No. 848,140 was void upon its face for want of patentable invention.

3. The Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, erred in finding that the Towne Patent No. 848,140 was void upon its face for want of patentable novelty.

In order that the foregoing Assignments of Error may be and appear of record the complainant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with the laws of the United States. [21]

WHEREFORE, the said complainant prays that said decree dismissing said Bill of Complaint be reversed, and that the United States Circuit Court for the Southern District of California, Southern Division, be directed to enter an order setting aside the said decree and ordering defendant to answer, and that said suit be heard upon its merits.

All of which we respectfully submit.

FREDERICK S. LYON,
Solicitor and of Counsel for Complainant.

Due and personal service and receipt of a copy of the foregoing Assignments of Error is hereby acknowledged and accepted this —— day of September, 1911.

_____,
_____,
Solicitors and of Counsel for Defendant.

[Endorsed]: No. 1597. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Company,

Complainant, vs. Don Lee, Defendant. In Equity. Assignments of Error. Filed Sep. 12, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [22]

United States Circuit Court, Southern District of California, Southern Division.

IN EQUITY.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

Order Allowing Appeal, etc.

In the above-entitled cause the complainant having filed its petition for an order allowing an appeal, together with an Assignment of Errors;

NOW, upon motion of Frederick S. Lyon, Esq., solicitor for complainant, it is ordered that the said appeal be and is hereby allowed to the said complainant, to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered in this Court on the 8th day of September, 1911, dismissing complainant's Bill of Complaint, with costs, and that the amount of complainant's bond on said appeal be, and the same is hereby fixed at the sum of Two Hundred and Fifty ($250.00) Dollars.

It is further ordered, that upon the filing of such security a certified transcript of the records and proceedings herein be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 12th, 1911.

OLIN WELLBORN,
Judge. [23]

[Endorsed]: No. 1579. United States Circuit Court, Southern District of California, Southern Division. Towne Patent Steering Wheel Company, Complainant, vs. Don Lee, Defendant. In Equity. Order Allowing Appeal. Filed Sep. 12, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Complainant. [24]

[Bond.]

In the United States Circuit Court, for the Ninth Circuit, Southern District of California, Southern Division.

TOWNE PATENT STEERING WHEEL COMPANY,
Complainant,
vs.
DON LEE,
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to trans-

act business in the State of California, is held and firmly bound unto Don Lee, defendant in the above-entitled suit, in the penal sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the said Don Lee, his heirs and assigns for which payment, well and truly to be made, the United States Fidelity and Guaranty Company binds itself, its successors and assigns firmly by these presents.

Sealed with its corporate seal and dated this 6th day of October, 1911.

The condition of the above obligation is such that whereas the said Towne Patent Steering Wheel Company, complainant in the above-entitled suit, is about to take an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse a final decree made, rendered and entered by the Circuit Court of the United States for the Southern District of California, Southern Division, in the above-entitled cause by which the Complainant's Bill of Complaint was dismissed and judgment ordered in favor of the defendant, Don Lee, for costs: [25]

NOW, THEREFORE, the condition of the above obligation is such that if the Towne Patent Steering Wheel Company shall prosecute its said appeal to effect and answer all costs which may be adjudged against it if it fail to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

By GUY B. BARHAM, [Seal]

Attorney in Fact.

Attest: ————————.

State of California,
County of Los Angeles,—ss.

Personally appeared before me Guy B. Barham, on this 6th day of October, 1911, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing bond, and who being duly sworn, according to law, deposes and says: that he resides at Los Angeles, in the State of California; that he is attorney in fact of The United States Fidelity and Guaranty Company and knows the corporate seal thereof; that the said company is duly and legally incorporated under the laws of the State of Maryland, and duly licensed to transact business in the State of California; that the seal affixed to the foregoing bond is the corporate seal of the United States Fidelity and Guaranty Company and thereto affixed by order and authorization of the Executive Committee of said company; that he signed his name thereto by like order and authority and that she is acquainted with Guy B. Barham and knows him to be the attorney in fact of said company, and that the signature of said Guy B. Barham, subscribed to said Bond is in the genuine handwriting of said Guy B. Barham and was thereto subscribed in the presence of this Deponent.

_____,

Notary Public in and for the County of Los Angeles, State of California. [26]

Subscribed and sworn to before me this 6th day of October, 1911.

[Seal] V. M. HUTCHINS,

Notary Public in and for Los Angeles County, State of California.

Approved.

OLIN WELLBORN,

Judge.

[Endorsed]: No. 1579. United States Circuit Court for the Ninth Circuit, Southern District of California, Southern Division. Towne Patent Steering Wheel Company, Complainant, vs. Don Lee, Defendant. Bond. Filed Oct. 7, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504–7 Merchants Trust Building, Los Angeles, Cal., Attorney for Complainant. [27]

[Certificate of Clerk U. S. Circuit Court to Transcript of Record, etc.]

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1597.

TOWNE PATENT STEERING WHEEL COMPANY,

Complainant,

vs.

DON LEE,

Defendant.

I, Wm M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing twenty-seven typewritten pages, numbered from 1 to 27, inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which a Final Decree was made and entered in said cause, the Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Bond on Appeal in the above and therein entitled cause, and that the same together constitute the Transcript of the Record on Appeal to the United States [28] Circuit Court of Appeals for the Ninth Circuit, in said cause;

I do further certify that the cost of the foregoing record is $20.95, the amount whereof has been paid me by the Towne Patent Steering Wheel Company, the Appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, this 21st day of October, in the year of our Lord one thousand nine hundred and eleven, and of our independence the one hundred and thirty-sixth.

[Seal] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California. [29]

[Endorsed]: No. 2057. United States Circuit Court of Appeals for the Ninth Circuit. The Towne Patent Steering Wheel Company, a Corporation, Appellant, vs. Don Lee, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

Filed October 26, 1911.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Order Enlarging Time to Docket Cause and File Record.]

United States Circuit Court of Appeals, for the Ninth Circuit.

TOWNE PATENT STEERING WHEEL COMPANY,

Appellant,

vs.

DON LEE,

Appellee.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is enlarged and extended to and including the 14th day of November, 1911.

Los Angeles, California, October 7th, 1911.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: No. 2057. United States Circuit Court of Appeals for the Ninth Circuit. Towne Patent Steering Wheel Company, Appellant, vs. Don Lee, Appellee. Order Extending Time to Docket Appeal. Filed Oct. 9, 1911. F. D. Monckton, Clerk. Refiled Oct. 26, 1911. F. D. Monckton, Clerk.

[Stipulation for Continuance to May, 1912, Session, for Filing of Printed Copies of Patent in Suit, etc.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2057.

THE TOWNE PATENT STEERING WHEEL COMPANY, a Corporation,

Appellant,

vs.

DON LEE,

Appellee.

Inasmuch as the transcript of record certified to this court from the Circuit Court does not contain a copy of the patent in suit, and therefore no copy thereof appears in the printed transcript of record, and in order to review the decree appealed from such patent must be before the Court, and it being impractical for the parties to produce the necessary copies of said patent to complete the record and to brief the case on or before February 7th, 1912, the date upon which said cause is now set for hearing, it is hereby stipulated by and between the parties to said cause that the said cause be continued from the February, 1912, term of said court to the May, 1912, term of said court, and that in lieu of a writ of certiorari for diminution of the record, the appellant shall file thirty printed copies of the patent in suit and the same shall be bound with this stipulation as a supplement to the record.

Dated Los Angeles, California, January 24th, 1912.

FREDERICK S. LYON,
Solicitor and of Counsel for Appellant.
CASSELL SEVERANCE,
HENRY T. HAZARD,
Solicitors and of Counsel for Appellee.

[Endorsed]: No. 2057. United States Circuit Court of Appeals for the Ninth Circuit. Towne Patent Steering Wheel Company vs. Don Lee. Stipulation for Continuance of Case to May, 1912, Session, etc. Filed Jan. 25, 1912. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court-room, in the City and County of San Francisco, on Monday, the fifth day of February, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

No. 2057.

THE TOWNE PATENT STEERING WHEEL COMPANY (a Corporation),

Appellant,

vs.

DON LEE,

Appellee.

Order Continuing Appeal for Hearing and Allowing Filing of Copies of Patent in Suit, etc.

Pursuant to the stipulation of counsel, filed January 25, 1912, it is ORDERED that the appeal in the above-entitled cause be, and hereby is, continued from February 7, 1912, to the May, 1912, session of the court, and that, in lieu of the issuance of a writ of certiorari for diminution of record, and return thereto, the appellant be, and hereby is, allowed to file thirty printed copies of the patent in suit, one of which printed copies, together with a printed copy of said stipulation and of this order, shall be bound in each of the printed copies of the record on file as a supplement thereto, and the surplus copies of such supplemental matter shall be distributed to counsel.

Patent Drawings and Specifications of Letters
Patent No. 848,140.

No. 848,140. PATENTED MAR. 26, 1907.

W. F. TOWNE.

STEERING WHEEL FOR AUTOVEHICLES.

APPLICATION FILED NOV. 8, 1906.

Fig. 1.

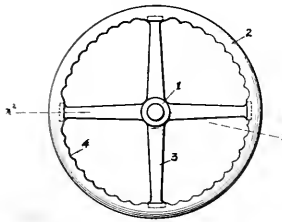


Fig. 2.

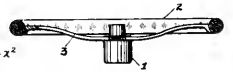


Fig. 3.

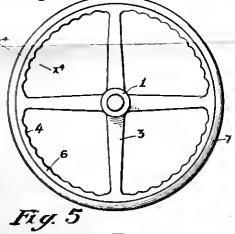


Fig. 4

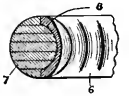


Fig. 5

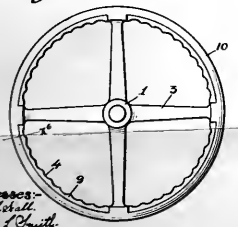
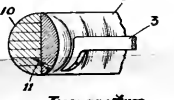


Fig. 6.



Witnesses:-
Isabel Hall.
Emma J. Smith.

Inventor
William F. Towne.
By Townsend, Lyon, Hackley & Knight
his attys

UNITED STATES PATENT OFFICE.

WILLIAM F. TOWNE, OF LOS ANGELES, CALIFORNIA, ASSIGNOR OF ONE-HALF TO CHARLES R. SUMNER, OF LOS ANGELES, CALIFORNIA.

STEERING-WHEEL FOR AUTOVEHICLES.

No. 848,140. Specification of Letters Patent. Patented March 26, 1907.

Application filed Nov. 8, 1906. Serial No. 342,570.

To all whom it may concern:

Be it known that I, WILLIAM F. TOWNE, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles, State of California, have invented a new and useful Steering-Wheel for Autovehicles, of which the following is a specification.

The main object of the present invention is to provide a steering-wheel for automobiles and the like, with means for improving the grip or hold of the operator thereof.

The especial object of the invention is to provide means for firmly holding the wheel when it tends to turn violently, as when the automobile is running at a high speed and on a more or less rough road.

A further object of the invention is to provide such means in a convenient, simple, and cheap form.

In the accompanying drawings, Figure 1 is a plan of one form of the invention. Fig. 2 is a section on line $x^1 x^2$, Fig. 1. Fig. 3 is a plan showing another form of the invention. Fig. 4 is a section thereof on line $x^3 x^4$. Fig. 5 is a plan of another form of the invention. Fig. 6 is a section on line $x^5 x^6$, Fig. 5.

Referring to Figs. 1 and 2, the steering-wheel comprises the usual hub 1, rim 2, and spoke 3, said rim being preferably of wood. On the inner face of said rim, preferably around the complete circumference thereof, are provided finger-grip means, consisting of notches or indentations 4, formed in said inner face. This rim is preferably the usual wooden rim and is circular, these notches being formed simply by indentations therein in the nature of scallops. In using the wheel the operator will in general grasp the wheel with his hands, mainly engaging the outer face; but in case of an emergency, such as in running on a rough road or at high speed, where the wheel is subject to a sudden jar or jolt due to swerving of the steering-wheels on striking an obstruction, the operator brings his fingers against the inner faces of the wheel, his fingers then engaging in the indentations 4 to tightly grip the wheel and hold the same from slipping. At the same time the palm of the hand rests against the smooth outer surface of the rim, thereby giving a smooth round surface to take the pressure of the palm and enabling the operator to use his hand in gripping to the best advantage. The scallops or indentations preferably extend all the way around the wheel, except at the spokes, so that whatever be the position of the wheel good gripping action will be insured.

In some cases it may be desirable to form the wheel, as shown in Figs. 3 and 4, with an inner metallic rim member 6, secured to or cast with the spokes 3 and supporting the wooden outer rim or member 7, said inner rim member being formed with a circumferential groove 8, in which the outer rim member engages. The outer rim member is built up in the usual manner, enabling it to be put in place in the groove. The indentations 4 are in this case formed in the inner rim member 6, which serves to take the excellent strain on jolting of the wheels.

Figs. 5 and 6 show another form of the invention, wherein the indentations 4 are formed in a supporting metallic arc-shaped member 9, inserted in a wooden outer rim 10, which is secured to the spokes 3, as in Fig. 4, the metallic arc being fastened to the rim 10 by screws 11.

What I claim is

1. A steering-wheel having a rim with a smooth outer surface and an indented inner surface for the purpose set forth.

2. A steering-wheel having a rim with a smooth outer surface and an indented inner surface to form a continuous finger-grip for turning the wheel.

3. A steering-wheel having a rim composed of inner and outer members, the outer member being supported in and by the inner member and having a smooth outer surface, and the inner member having an indented inner surface.

In testimony whereof I have hereunto set my hand, at Los Angeles, California, this 1st day of November, 1906.

WILLIAM F. TOWNE.

In presence of—
ARTHUR P. KNIGHT,
FRANK L. A. GRAHAM.

No. 2057.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Towne Patent Steering Wheel Company, a corporation,
Complainant and Appellant,
vs.
Don Lee,
Defendant-Appellee.

APPELLANT'S BRIEF.

FREDERICK S. LYON,
504 Merchants Trust Bldg., Los Angeles, Cal.,
Solicitor for Appellant.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 2057.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Towne Patent Steering Wheel Company, a corporation,
Complainant and Appellant,
vs.
Don Lee,
Defendant-Appellee.

APPELLANT'S BRIEF.

This cause comes before this court on an appeal by complainant from a decree of the United States Circuit (now District) Court for the Southern District of California, Southern Division, dismissing complainant's bill of complaint.

The bill of complaint alleges that complainant's assignor, William F. Towne, was the inventor of a certain improved steering wheel for autovehicles; that he made due application for letters patent of the United States, and that after due proceedings had, including the usual examination as to novelty and invention, letters patent of the United States No. 848,140 were on March 26, 1907, granted and issued for said invention by the

United States government; that said letters patent were duly assigned to and that the complainant was at the time of the filing of said bill of complaint the owner of the exclusive right, title and interest therein and thereto.

The bill of complaint alleges [Transcript Record p. 7]:

"That the trade and public have generally respected and acquiesced in the validity and scope of said letters patent No. 848,140, and in the exclusive rights of your orator and of your orator's assignors therein and thereunder, and save for the infringement thereof by defendant, as hereinafter set forth, your orator and your orator's assignors and licensees have had and enjoyed the exclusive right, liberty and privilege since March 26th, 1907, of manufacturing, using and selling steering wheels for autovehicles embodying and containing the invention described in, set forth and claimed in and by said letters patent No. 848,140, and but for the wrongful and infringing acts of defendant as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator."

To this bill of complaint defendant filed a demurrer [Transcript page 14], upon the following grounds:

"1. That it appears by complainant's own showing by the said bill that it is not entitled to the relief prayed by said bill against the defendant.

2. That the claims made in said letters patent, numbered 848,140, dated March 26, 1907, as alleged in said complaint, show on their face the lack of patentable novelty.

3. That the said claims show by their express limitations that it is not new, to roughen the surfaces of steering wheels.

4. That the said letters patent in suit are invalid and void, because the improvements therein set forth lack invention and did not require the exercise of the inventive faculty.

5. That the said claims in the said patent are ambiguous, unintelligible and uncertain, in this: it is not described in the said specification and drawings, in such clear and exact terms as to enable anyone skilled in the art, to which the invention pertains to practice the invention; and particularly to distinguish it from the prior state of the art."

This demurrer coming on for argument, the court, after oral argument, sustained the demurrer, and, the complainant declining to amend, the court entered its decree dismissing the bill. The record does not contain any opinion of the lower court, and none in fact was filed, no written opinion having been rendered. The ground upon which the demurrer in the lower court was sustained was that the letters patent in suit were obviously totally lacking in validity, as not disclosing any patentable invention.

By statute the grant and issuance of the letters patent raised a *prima facie* presumption of patentable novelty, and this presumption is fortified by the allegations of the bill of complaint hereinbefore quoted setting forth the general acquiescence in the validity of the letters patent.

It is a well-known rule of law that a demurrer admits the truth of all facts alleged in the bill of complaint.

The Rule of Law Applicable to Demurrers in Patent Cases, that the Patent is Void on its Face.

It is well known that patents for inventions are *prima facie* evidence of their validity, and this presumption, arising from the grant and issuance of the patent, must throw the decision in favor of the validity of the patent, if there be any doubt as to patentable novelty.

Morton v. Llewellyn, 164 Fed. 693;
Morgan v. Daniels, 153 U. S. 120;
Cantrell v. Wallick, 117 U. S. 679;
Leubetter v. Holthaus, 105 U. S. 96;
Marsh v. Seymour, 97 U. S. 349;
Ashcrofts v. Railroad Co., 97 U. S. 197;
Coffin v. Ogden, 18 Wall. 124;
Gandy v. Belting Co., 143 U. S. 595.

This rule lies at the foundation of the rule regarding demurrers, for if there be any doubt whatever the court will hear the proofs and in any case if then there be doubt the *prima facie* presumption arising from the grant and delivery of the patent will throw the decision in favor of the patent.

Hunt Bros. Fruit Packing Co. v. Cassidy, 53 Fed. 259;
Harper & Reynolds Co. v. Wilgus, 56 Fed. 588;
Bottle Seal Co. v. De la Vergne, 47 Fed. 59.

It may therefore be stated that, when a patent cause (either in equity or at law) is considered upon a demurrer on the ground the patent is void upon its face, the rule is: The patent must be so clearly void, for want of patentable novelty, that no possible evidence in-

troduced by plaintiff could show validity, otherwise the demurrer will be overruled. Or otherwise stated, such a demurrer should only be sustained in exceptional case, where the question is entirely free from doubt, for if doubt appears plaintiff is entitled to its benefit.

Neidich v. Fosbenner, 108 Fed. 266;

Lang v. McGuin, 177 Fed. 219;

Electric Vehicle Co. v. Winton Co., 104 Fed. 814;

Wills v. Scranton Co., 153 Fed. 181, 82 C. C. A. 355;

Jackes v. Hemp, 140 Fed. 254, 71 C. C. A. 246;

Chinnock v. Patterson, 112 Fed. 531, 50 C. C. A. 384;

Hogan v. Westmoreland Co., 154 Fed. 66, 83 C. C. A. 178;

Faries v. Brown, 102 Fed. 508, 42 C. C. A. 483;

Caldwell v. Powell, 73 Fed. 488;

Milner v. Yesbera Co., 111 Fed. 386, 49 C. C. A. 397;

American Co. v. Buckskin Co., 72 Fed. 508, 18 C. C. A. 662;

Manufacturing Co. v. Scherer, 100 Fed. 459;

N. Y. Belting Co. v. N. J. Co., 137 U. S. 445.

Such a demurrer should be sustained:

"Only when there is no room for thinking any evidence can be adduced which would, if put into the case, alter the *clear conviction* of the court that there is no patentable invention in the production patented."

Drake v. Brownell, 123 Fed. 86, 59 C. C. A. 216;

Milner v. Yesbera (*ubi supra*);

Strom v. Weir, 83 Fed. 170, 27 C. C. A. 502.

The presence of the slightest evidence of novelty is sufficient to defeat a demurrer for want of invention.

Lyons v. Drucker, 106 Fed. 416, 45 C. C. A. 368.

In Caldwell v. Powell, 71 Fed. 970, Circuit Judge Dallas held:

> "No case of this character should be disposed of upon such a demurrer, unless the invalidity of the patent be plain, and the common knowledge relied upon to defeat it be of matters of which the court may properly take judicial notice."

In Covert v. Travers Bros. Co., 70 Fed. 788, Circuit Judge Coxe held:

> "That a patent, manifestly invalid upon its face, may be so declared upon demurrer, is now settled beyond dispute. * * * It is also true that this power should be exercised with the utmost caution and only in the plainest cases. If there is doubt it should be resolved in favor of the patent."

Circuit Judge Taft (now president of the United States), in American Fibre-Chamois Co. v. Buckskin Fibre Co. (72 Fed. 580), pointed out that to dismiss a suit on demurrer is to deny the plaintiff the right to adduce evidence to support the presumption in favor of the validity of the patent, and said:

> "Therefore the court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind should show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity, by proof, to support and justify the action of the

patent office. This is the view which has been taken by the Supreme Court and the most experienced patent judges upon the circuit."

In Rodwell Mfg. Co. v. Housman, 58 Fed. 870, Judge Wheeler said:

> "Unless the patent is so void on its face as to require no defense to a suit upon it, the demurrer must be overruled."

In Lalance & Grosjean Mfg. Co. v. Mosheim, 48 Fed. 452, Circuit Judge Coxe said:

> "The authority of a judge to substitute his knowledge for legal proof should be exercised with the utmost caution and only in the plainest cases. If there be the slightest doubt it is by far the safer way to permit the cause to proceed in the usual manner."

In Bottle Seal Co. v. De la Vergne, 47 Fed. 59, Judge Green held:

> "To hold letters patent invalid upon a demurrer the judgment must be surely based upon certainty. Doubts must be resolved against the defendant."

In Blessing v. John Trageser Steam Copper Works, 34 Fed. 753, Circuit Judge Shipman said:

> "To decide, in advance of an opportunity to give evidence, that no doubt can possibly be given upon the question of invention which would permit the case to be submitted to the jury, seems to me to be ill advised, except in an unusual case. * * * I do not wish to assume that I cannot be better instructed than I am at present as to the degree of ingenuity which the improvement required."

The matter was very well put by Circuit Judge Putnam, in Henderson v. Tompkins, 60 Fed. 758:

> "Assumption on the part of courts of knowledge which they may not in fact possess, followed by numerous dismissals of suits upon demurrer, would involve the hazard of barring meritorious causes, contrary to the express allegations of the bill. Especially would this occur in that class of cases * * * in which the question of utility and patentable novelty are in some degree determined by what transpires subsequently to the issue of the patent."

In Krick v. Jansen, 52 Fed. 823, Judge Townsend said:

> "The question of patentable novelty is a question of fact, and, except in a very clear case, it ought not to be decided until after an opportunity has been given to submit evidence thereon * * * and where this question is doubtful an extensive use by the public may serve to resolve the doubt in favor of the patentee."

In Davock v. Chicago & N. W. Ry. Co., 69 Fed. 468, Judge Seaman held:

> "It is unquestionable that this objection may be taken by demurrer, and it is equally clear that the demurrer should be overruled, and the defendant put to answer, if the question of invention or novelty is fairly open to doubt. Oftentimes a showing of the prior state of the art will demonstrate that to be true invention which does not seem to possess this merit upon first impression and when read in the simple terms of the patent, and all light in that direction is shut out if the demurrer is sustained. The argument that the court can take judicial notice of certain facts which are of common understanding does not apply, as it would require, for the purposes of this case, an assumption of knowledge, not only of the methods which have been employed for

> joining the rails, but of the practical difficulties, under various conditions, which were met, and the measure in which the means theretofore employed had failed, and the alleged invention had succeeded, in overcoming them."

In Root v. Sontag, 47 Fed. 308, on demurrer to a bill for infringement, Judge Hawley said:

> "Ordinarily the nature of the subject demands the testimony of witnesses skilled in the art to which the patent relates, to enable the court to act intelligently upon the question whether or not the improvement required inventive skill for its production."

Judge Blodgett, in Eclipse Mfg. Co. v. Adams (36 Fed. 554, 556), said:

> "While I do not intend to lay down a rule, I am free to say that I do not feel justified in holding a patent void for want of novelty on common knowledge, unless I could cite instances of common use which would at once, on the suggestion being made, strike persons of ordinary intelligence as a complete answer to the claim of such patent."

The question brought before this court for determination then is:

As a matter of law is it so plain and clear that all that is described, shown and claimed in the Towne patent was commonly known or commonly used in the automobile art prior to Towne's discovery thereof in 1906, that no doubt whatever can exist and no evidence whatever that could be produced could raise a substantial issue of fact as to novelty or invention? If there be such an issue of fact, then the court, under the above authorities, will overrule the demurrer and order the case heard upon its merits upon the proofs to be educed by the par-

ties. In other words, give both parties a chance to be fully heard and judge the case upon the evidence educed.

As clearly indicated in the foregoing extracts from the opinions of the courts, the declaring a patent void on demurrer is a dangerous one, as it cuts off the parties from bringing before the court the facts surrounding the particular invention and its relation to the patricular art in which it belongs. Many things look extremely simple after they have been accomplished, and yet the proofs in the particular art to which they belong show that the steps, simple though they seem after taken by the inventor, to have laid unseen and unnoticed by the "ordinary mechanics" skilled in the art and to have required more than the ordinary skill of the art to discover them. An extreme example of this was under consideration in this court in

John Kitchen, Jr., Co. v. Levison, 188 Fed. 658.

This was the manifold bookcase, in which the carbon sheets were attached to a cardboard stub. If the court had attempted to determine the validity of that patent on demurrer it would probably have held the patent void, but the evidence educed led to another and reverse decree. Your Honors said:

> "In addition to the presumption which arises from the issuance of the patent to the appellee, there are to be taken into consideration as sustaining his patent the further facts that, when his invention was made, there was a want in the art for such a device, that in the prior art there were well recognized and admitted defects, and that appellee's device eliminated those defects and went into general and successful use."

The want in the art could not have been apparent from the face of the patent, nor could the defects in the prior art have been apparent from the face of the patent in suit, except as set forth in the description of the patent in suit, and the Towne patent here before this court points out defects in the prior art.

The Towne steering wheel has gone into great and extensive use and has been recognized as having merit by the automobile manufacturers to the extent that practically all racing machines and many of the large heavy cars are provided with the Towne steering gear.

The presumption of law arising from the grant and issuance of the patent, after due examination by the commissioner of patents as to novelty and invention, is that the combinations set forth in the three respective claims of the Towne patent were novel and required invention and were not common knowledge. This presumption is reinforced and strengthened by the public adoption and use of the Towne steering wheel and by the general acquiescence in the validity of the patent. These facts are alleged in the bill and are admitted to be as set forth therein. They can be readily proven at final hearing.

The courts have oft said that the best proof of the utility of an alleged invention was its copying and use by defendant.

The seeming apparent obviousness of an improvement after it has been accomplished is not a safe guide in testing the presence or absence of invention. This has been recognized repeatedly by the courts.

"The practiced eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one."

Potts v. Creager, 155 U. S. 608;

Loom Co. v. Higgins, 105 U. S. 580, 591;

Dececo Co. v. Gilchrist, 125 Fed. 298.

Yet the records of the patent office do not disclose that the practiced eye of the ordinary mechanic or of prior inventors had ever seen Mr. Towne's useful combinations. The grant of the patent is proof of these facts.

The specification of the patent in suit sets forth that the main object of the Towne invention is to provide the steering wheel of an automobile with means for improving the grip or hold of the operator or driver; and a further object of the invention, set forth in lines 59 to 78 of the specification, is to provide a built-up construction of the steering wheel as there set forth. This second built-up construction is set forth in claim 3, and, so far as appears from common knowledge, is totally new. This alone requires the reversal of the order appealed from and an answer by defendant. Defendant is charged with the infringement of all the claims, and claim three is clearly novel.

Claims 1 and 2 of the patent are directed to the combination in a steering wheel of a rim, the rim provided *with a smooth outer surface* and an *indented inner surface.*

Not Obvious to Place Indentations on One Side of Rim Only.

The usual practice before Towne's invention was to wind cords around the steering wheel to give a better grip of the hand. It has also been the practice to wind cords or ropes around handles of tennis rackets, baseball clubs, etc., in order to get a better grip. To form serrations on one side only in any of these instances was thus not obvious. Grips have also been made by a turning lathe to form annular ridges or ridges encircling the hands, but in all of these instances the indentations have been annular, that is, *they have completely encircled the thing gripped.* In winding rope around to form the ridge, or in turning the ridge by a turning lathe, the ridge must necessarily in either case be extended completely around the thing to be gripped, and thus *the obvious thing* was to have the indentation extend completely around the thing to be gripped and in the obvious thing to form the indentation on one side only. To do other than this necessitates a special thought process, which departs from the beaten method, to evolve the construction which the patent claims, and this thought process must be constructive. That which requires special thought and constructive thought departs from the beaten paths along the obvious lines and the thing evolved by such process is certainly not what can be termed the obvious thing. Hence the thing claimed is not obvious.

New Result Produced and Well Known Test of Invention Thereby Proven.

This device in mode of operation differs from the use of a tennis racket or baseball club in that in the two latter instances the hands grip practically the same place at all times, whereas an automobile steering wheel which is revolved into different positions requires that it be gripped at all points of its circle, and this revolving motion is one which is not present in either the baseball club or tennis racket. If the steering wheel be provided with indentations which extend entirely around it as has been the obvious thing heretofore accomplished by winding it around with cord, the outer surface of the wheel being thereby corrugated or indented by the cord will retard the motion of the wheel through one hand while the other hand is pulling the wheel around and thereby get the very purpose for which the corrugation is used. With the smooth outer rim, which is one of the essential elements of the patent, the wheel while pulled around by one hand can smoothly slide through the other hand while the one hand is still resting on the wheel, and *vice versa;* the grip of either hand on the wheel being accomplished by the simple act of closing in the fingers of the hand against the inner surface of the wheel. With the old time obvious method of winding the wheel with rope it is necessary to entirely disengage either hand from the wheel when the wheel is being turned by the other hand. Both hands of course may remain gripped to the wheel when the wheel is only turned through a very short revolution, but in the actual practice in running, in turning corners and in turning around in the road, it

is necessary to move the wheel through large arcs of rotation, and this necessitates that the hands move from one position to another as the wheel shifts. This is accomplished by the alternate gripping and relaxing of the hands of the driver. Thus while one hand is gripping to hold the wheel, the other hand is relaxing its grip to permit the wheel to turn, and *vice versa*. With the wheel which is wound with cord, i. e., the old time obvious method, it was necessary to entirely remove one hand or the other with the wheel thus turned, while with the construction claimed in the patent, which permits both hands at all times to rest upon the wheel, this is not necessary. That hand which may have a relaxed grip on the wheel can still rest on the wheel, and the smooth outer periphery of the wheel slides into that hand, while when that hand is to grip the wheel the fingers are closed against the inner periphery. If the outer peripheries are notched this is impossible. We thus find two distinct results produced by this construction which are not produced by anything theretofore known which employed a corrugated gripping surface.

First: With the patented construction the hand which is not gripping can rest upon the wheel and be supported thereby while the wheel is being smoothly revolved through that hand.

Second: The gripping and disengaging actions are performed by a closing and releasing movement of the fingers against the inner peripheries of the wheel of the patented construction, while in all previous constructions the entire hand must either be entirely removed from the wheel or clasped around the wheel.

The claims do not call for the mere roughening of the surface nor for the mere indenting of a part only of the surface of the thing to be gripped, but specifically and accurately define that the indented portion is to be the *inner* surface *only* and that the *outer* surface must be smooth. These important distinctions are absolutely necessary to the production of the above-mentioned results, for if the indented surfaces were on the outer side only and the inner side were smooth it would be impossible for the idle hand to not be caught by the outer peripheries and carried around with the wheel. This is the exact, specific and definite terms of the claims and must be followed in constructing a steering wheel which will produce these beneficial results, and therefore, in order to show that the claims are anticipated, it will be necessary for defendant to prove that there was prior public knowledge or use of a steering wheel with a smooth *outer* periphery and with an indented inner periphery. It will not be sufficient to prove that it was known to indent the wheel on both sides, as that does not produce the results of the patent.

The production of these new results are facts capable of physical proof and are not mere theoretical statements, and these physical facts stand as most eloquent and truthful, though mute, proofs of patentability. These new results are inherent in the construction patented, they had their birth with the production of the thing patented, and whenever a steering wheel is constructed as described in the patent these new results will necessarily flow from such construction whenever the construction is put into use. They are therefore an ideal

attribute of the patent, cannot be passed from the patent, and are therefore *prima facie* proof of the patentability of the claims under the well-recognized doctrine that whenever a new construction produced a new result it is patentable.

Expert evidence will bring out strongly these facts and show conclusively that in actual practice these are not mere theories. For these reasons, also, the court should overrule the demurrer and hear the cause upon its merits.

It is submitted that the Circuit Court erred in not assigning the defendant to answer and in not hearing this cause upon the proofs to be educed on behalf of the parties; that it should have given complainant the benefit of the presumptions arising from the grant of the patent, the general public acquiescence therein; the general use of the invention; and should at the very least have heard the evidence to support these facts.

FREDERICK S. LYON,
Solicitor for Appellant.

No. 2057.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The Towne Steering Wheel Company, a corporation,
Complainant and Appellant,
vs.
Don Lee,
Defendant-Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

At the outset of our argument, it is distasteful to indulge in critical remarks involving an invasion of the rights of appellee, by counsel for appellant, but we think that, in view of the fact that we are, under the rules of this court, limited to but seven days within which to prepare, serve and file our reply brief, appellant should be made to understand that the same rule that prescribes seven days for us, prescribes that he shall serve and file his opening brief at least ten days before the date set for hearing, and not eight or nine days before.

This suit was brought by the appellant as complainant, in the United States Circuit Court for the Southern District of California, in the Southern Division, for infringement of United States letters patent No. 848,140, granted on March 26, 1907, to William F. Towne and Charles R. Sumner for a steering wheel for auto vehicles. We demurred to the bill of complaint on the ground that the patent involved is invalid upon its face, since the alleged invention covered thereby lacked patentable novelty and patentable invention, and after mature consideration by the learned judge below, our demurrer was sustained.

As a matter of law, there can be no doubt that letters patent should not have issued in this case, as the patent exhibits such a lack of patentable novelty upon its face as to warrant the court sustaining the demurrer interposed by appellee. The facts appearing upon the face of the patent come wholly within our common knowledge and are therefore matters of which the court may take judicial notice. These matters were carefully considered in the court below, and the ruling of the court on our demurrer *was not* the result of a passing glance, as intimated by counsel for appellant.

The most contended for by appellant is that through his overwhelming "inventive genius" he has successfully drawn from the storehouses of nature the new thought, that to get a firmer hand-hold on an object, circular in form, he can give it a serrated, indented, notched or corrugated surface, and the patent office has permitted such a thought to arise to the dignity of invention by issuing a patent therefor.

On page 17 of appellant's brief is designated two distinct results produced by HIS particular means for securing a firmer hold on a steering wheel, viz., the hand that is not grasping can rest upon the wheel and be supported while the wheel is passing through it, and to accomplish this result, appellant claims the distinction of having conceived the novel means of the application of a "smooth surface." We would feel somewhat embarrassed if called upon to indicate to this court just when it FIRST became known that a smooth surface would slip unimpeded through the ungripped human hand; but to the most casual observer it must occur, after a careful reading of the PATENT SPECIFICATION, that the *inventor* makes no such claim for his alleged invention as is given to it by his counsel. (Page 17 of appellant's brief.)

The undoubted intention of the patent was, as has been clearly set forth in the specification, is to "provide a steering wheel for automobiles with means for improving the grip or hold of the operator." (Page 1, line 9, of the specification.) Also, "The *especial object* of the invention is to provide means for firmly HOLDING THE WHEEL, when it tends to turn violently," etc. (Page 1, line 12, of patent specification.) To accomplish the above objects the patent office has issued an alleged patent, in which "the inventor" make three distinct claims as follows:

1. "A steering wheel having a rim with a smooth outer surface and an indented inner surface for the purposes set forth."

2. "A steering wheel having a rim with a smooth outer surface and an indented inner surface to form a continuous finger grip for turning the wheel."

3. "A steering wheel having a rim composed of inner and outer members, the outer member being supported in and by the inner member and having a SMOOTH OUTER SURFACE, and the inner member having an INDENTED INNER SURFACE."

This brings us to a consideration of the question, viz., does the patent here in controversy disclose a patentable invention, one in which the alleged improvement amounts to anything more than mere mechanical skill? Does the roughening of any portion of the surface of a circular steering wheel amount to patentable invention, as distinguished from mere mechanical skill, in view of the repeated practice from time immemorial of roughening hand-holds of all kinds for the purpose of securing a firmer grip on the object so roughened and to prevent the hand from slipping?

This case is of an exceedingly simple character, and such as should require no testimony to enlighten the court as to the nature of the invention. There is nothing obscure or difficult in the structure of the patented device requiring such testimony. In the light of a great number of decisions of the Supreme Court and the Circuit Court of Appeals, this case was properly decided by the court below upon demurrer. The Supreme Court of the United States early established the rule that cases of this character were PROPERLY decided upon demurrer. In point, we cite the case of Richards v. Chase Elevator Co., 158 U. S. 299, in which it was held:

> "While patent cases are usually disposed of upon bill, answer and proof, there is no objection, if the patent be invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue so formed. We have repeatedly held

> that a patent may be declared invalid for want of patentable novelty, though no such defense be set up in the answer." (Citing Dunbar v. Myers, 94 U. S. 187; Slawson v. Etc. Railway Company, 107 U. S. 649; Brown v. Piper, 91 U. S. 27.)

Following this rule, the case of Strom v. Weir, 83 Fed. 170, 27 C. C. A. 502, held:

> "That it was no longer open to question that where the case presented is clear and the court finds no difficulty in understanding the scope and character of the invention from the patent itself, when tested by the COMMON KNOWLEDGE pertaining to it, and thereupon discerns that the patent is not sustainable, the proper and expedient course is to dispose of the case on demurrer, and thus put an end to useless litigation."

And the same rule has been adhered to by courts in various cases, as, for instance, in the case of Victor Talking Machine Company v. Etc. Mfg. Co., lately reported in 178 Fed. 455, in which the court said:

> "The courts have recognized the duty imposed upon them where it is clear that the device of the patent in suit does LACK PATENTABLE INVENTION, to so declare and dispose of the case on demurrer, and thus put an end to long and useless and expensive litigation."

And our courts have followed this ruling to such an extent that although the question of validity of the patent in such a case has not been raised by the pleadings, the courts will always consider the question of whether the invention, which is the subject-matter in controversy, is patentable or not, as always an open one. We refer the court to the case of Slawson v. Etc. Railway Co., 107 U. S. 649, and quote as follows:

> "We think this patent was void on its face (because the improvement described therein was not patentable), and that the court might have stopped short at that time, without looking beyond it into the answer and testimony, * * * and well have ADJUDGED IN FAVOR OF THE DEFENDANT."

And in our opinion it is not only a matter of justice and right that a case should be determined upon demurrer, but we respectfully submit it is the duty of the court to dismiss the case upon that ground and thus *avoid the time and expense* of needless litigation, which would necessarily follow if in every case the defendant should be put to his proofs.

Within the purview of the citations already presented it has been shown that there is no hesitancy on the part of the courts to dispose of a case upon demurrer on the ground that the same is lacking in patentable invention.

It remains then to be seen whether the structure as set forth by the claims of the patent is of a patentable nature. In this regard we have to consider whether the roughening or indenting of a hand wheel involves patentable novelty in view *of the well-known practice of roughening any hand-hold or other surface which is to be engaged by the hands of an operator,* and upon which the slipping of the hand should be prevented or otherwise.

On page 14 of appellant's brief he sets forth that claim 3 contains patentable subject-matter, in that it sets forth that a built-up construction as illustrated and described in the specification of the patent in suit is new, leaving for inference that the first two claims, which only cover an indented inner surface and a smooth exterior

surface of the wheel, are not new and patentable. *In order to support patentable novelty* for such a *built-up construction* as claim 3 sets forth, it was necessary to *include* the *subject-matter of the first two claims,* to-wit, a wheel having a smooth outer surface and an indented inner surface. If the indenting of the inner surface of a steering wheel is old and a matter of common knowledge, it certainly *would not support* a claim for a wheel made in *two* portions. It is perfectly obvious from the construction which illustrates claim 3 that to cast a circular rim having indentations in its inner periphery integral with the spokes and hub of the wheel, that it would be the most *common expedient,* that is to say, the most natural way of accomplishing such a construction, but evidently the patentee knew that metal would absorb heat and cold more readily than other materials and has substituted for an entire metal rim an outer ring of wood bolted or otherwise secured thereto. If by any chance such a built-up construction in itself was novel, then the inclusion of the *roughening means* would be utterly *unnecessary to* support the claim. The patent covers roughening means and does not embrace built-up construction.

It should be noted that nowhere in the patent itself is a claim setting forth a built-up construction without including the roughening means therein, and if the roughening means is not new, as set up in claim 3, *then the claim must fall.*

Referring to appellant's opening brief, at the top of page 16 the court will find appellant using as illustrative matter the case of a tennis racket, or a baseball bat, in a comparative sense with his claims under this patent for

an automobile steering wheel. They fail, however, to cite the court to the illustration of *an indented turning wheel of a valve* which is commonly used in connection with fluid service pipes for the purpose of controlling the flow of fluid therethrough, or the further illustration of the sword handles used at present by the United States and other governments, and which have been used by them from their inception, which are indented *on the inside of the handle* for the purpose of affording to the manipulator thereof a firmer hand-hold or grip. Likewise the watch stem, which latter shows the trend of human thought in this matter, and how common a mechanical expedient it is to indent or roughen a surface upon which it is desired to keep the hand or fingers from slipping.

In connection with this particular part of the alleged invention, we desire, at this time, to remind the court that appellant himself, in viewing the operation of the steering wheel of an automobile, is laboring under a total misconception of its real purpose. Appellant says, quoting from page 16, line 8, of his brief:

"If the steering wheel be provided with indentations which extend entirely around it, as has been the obvious thing heretofore, * * * the outer surface of the wheel being thereby corrugated or indented by the cord, will retard the motion of the wheel THROUGH ONE HAND WHILE THE OTHER HAND IS PULLING THE WHEEL AROUND, and thereby get the very purpose for which the corrugation is used."

Hazarding the displeasure of the court, we feel it necessary to remind appellant of the fact that the operation of a steering wheel of an automobile is not ac-

complished in any such manner. Both hands of the operator move at the same time; *one hand does not pull the wheel while the other hand slips through, but both hands naturally follow and grip the wheel in the direction in which the wheel is being moved,* and we believe that this court will agree with us that the illustration of appellant, above quoted, is entirely without practicability, and of absolutely no value whatever in practice.

Reverting again to the claims of appellant, we suggest that they present a structure involving a rim with a smooth outer surface and an indented inner surface, indented in such a manner that the inner surface forms a continuous finger grip, and we submit that the only purpose for which the indenting of the inner surface of the steering wheel is to afford the operator a firmer hand-hold upon the wheel, the fingers fitting in the indentations or serrations on the inner surface, and the palm of the hand, being flat, requiring a smooth outer surface, for the comfort and convenience of the operator.

The libraries containing old books of reference illustrate our theory by exhibiting to us roughened or indented and serrated handles in common use thousands of years before the time of Christ. We have in mind swords in a reference book belonging to the public library of Los Angeles, entitled "The Book of the Sword," by Richard F. Burton, London, published in the year 1884, on page 80 of which figure 82 shows a sword or dagger with indented or serrated handle, brought from Thebes 3000 years B. C. Also on page 129 of the same work is another illustration, equally applicable to the case at bar, as illustrating the point contended for by appellee. We also refer the court to a book of similar character,

entitled "Spanish Arms and Armor," by Calvert, MCMVII, Figs. 169, 187, 207. Persian swords of the 16th century are shown with practically the same kind of indentations for receiving the fingers of the holders of such implements, and are identical with those shown and employed upon the hand wheels of the patent in controversy.

We cite also, for the court's consideration, "Appleton's Encyclopedia of Applied Mechanics," published by D. Appleton & Company. The supplementary volume, at page 883, Fig. No. 6, presents to us a cut or diagram illustrating the round, indented, circular handle of a valve, designated a relief valve, presenting the corrugated surface, placed upon the handle for the express purpose of giving a firmer hand-hold and preventing the hand from slipping during the process of operation.

All these matters involve articles of every day life and are undoubtedly within common knowledge, so that the court, in the light of a large number of decisions, cannot hesitate to take judicial notice thereof.

> Thomas v. St. Louis, 149 Fed. 753, 79 C. C. A.;
> Strom v. Weir, 83 Fed. 170, 27 C. C. A. 502;
> Brown v. Piper, 91 U. S. 37;
> Slawson v. Etc. Railway Co., 107 U. S. 649;
> Richards v. Chase, 158 U. S. 299.

In the case of Slawson v. Etc. Railway Co., 107 U. S. 649, the court held:

> "In Atlantic Works v. Brady, Mr. Justice Bradley said: 'The design of the patent laws is to reward those who make some *substantial discovery* or invention which adds to our knowledge and makes a step in advance in the useful arts, BUT IT

WAS NEVER THE OBJECT OF THESE LAWS TO GRANT A MONOPOLY FOR EVERY TRIFLING DEVICE, EVERY SHADOW OF AN IDEA WHICH WOULD NATURALLY AND SPONTANEOUSLY OCCUR TO ANY SKILLED MECHANIC OR OPERATOR IN THE ORDINARY PROGRESS OF MANUFACTURE.' The same authorities apply with equal force to the patent for lighting the interior of the fare box at night by using the headlight of the car for that purpose. The elements of the contrivance, viz., the fare box, the headlight and the reflector, are all old. What is COVERED BY THE PATENT is simply the making of an aperture in the top of the fare box and turning the rays of the head lamp through it into the box by means of a reflector. In other words, it is the turning of the rays of the light to the spot where they are wanted by means of a reflector, and taking away an obstruction to their passage. The facts of GENERAL knowledge of which we take JUDICIAL notice, teach us that devices similar to this are as old as the use of reflectors. THE NEW APPLICATION OF THEM DOES NOT INVOLVE INVENTION. We are of the opinion that there was nothing patentable in the contrivance described in the patent."

And the decree of the Circuit Court was thereupon affirmed.

In the case of Victor Talking Machine Company v. Etc. Mfg. Co., reported in 178 Fed. 455, it was held:

"The means of securing the parts when thus put together by a simple pin or lug on the inside of the horn part to engage in the cam-like slot in the conveyor part, and the further drawing together of the parts by turning the pin in the slot, ARE MEANS SO OBVIOUS TO ANY MECHANIC THAT NO INVENTION CAN POSSIBLY BE INVOLVED THEREIN. * * * These disadvantages are said by counsel in his argument to be obvious and evident to the court. If so, as also said by the court below, they did not require expert or other testimony to point them out, being obvious and self-evident, the remedy em-

> ployed of cutting the horn in two sections WAS EQUALLY OBVIOUS AND SELF-EVIDENT, and to claim a patent monopoly therefor IS A MISUSE OF THE PATENT LAWS, WHICH ARE TO FOSTER INVENTION ALONE."

This court will observe in the light of the foregoing decisions, applying the rulings there laid down to the facts of this case, that the use of roughened, indented, serrated or corrugated surfaces are for preventing the slipping of hands upon implements or articles and insuring a safer hand-hold, and are such facts as come within our general knowledge, as is indicated, and such as the courts take judicial notice of. Here the elements of the device in controversy, to-wit, the hand wheel, including the rim, made in either one or two parts, that is immaterial, having a roughened or indented finger-engaging surface, either inside or out, are old elements, and the mere placing of such indentations at a position upon the hand-hold, *where they will be best engaged by the fingers of the driver of an automobile,* cannot, under any force of circumstances, possibly constitute an invention.

In the case at bar it would not, it seems to us, require more than the most ordinary mechanical skill to have determined that if the hands, in grasping the steering wheel of an automobile, had a tendency to slip, such slipping could be prevented by INDENTING OR ROUGHENING THE INNER SURFACE OF THE WHEEL, where the fingers of the hand would be found to clasp it; and this would lead to the further "discovery" that a smooth outer surface of the wheel would be easier upon the palm of the hand than to be required to grasp firmly with

the palm a roughened or corrugated surface; and to claim a *monopoly* for the use of this old and well-known expedient would be a gross misuse of the patent laws and an unwarranted violation of the rights of others.

In conclusion, we direct the attention of the court to the fact that one of the grounds of demurrer was taken with a view to the fact that the claims show and admit, by their own express limitation, that the broad principle of roughening the surface of a hand wheel was neither novel nor new. The claims include a specification OF A SMOOTH OUTER SURFACE, limiting the indentations or roughness to the INNER SURFACE ONLY. The direct inference is that to roughen surfaces of wheels somewhere is not new, and following this inference it must be evident that the mere shifting of the indentations to the portion of the wheel which the fingers are most likely to engage would certainly not require anything more than ordinary mechanical skill. We submit that in any view of the case the claims do not possess features, either novel or new, or present anything but the most ordinary and common expedient of the ordinary mechanic, and all contended for by appellant is properly designated as a new application of old facts, *all of general knowledge,* and do not in any sense of the word call forth anything further than ordinary mechanical skill, which, under no conditions, can be characterized as arising to the dignity of invention, or calling for inventive ingenuity.

HENRY T. HAZARD,
OF HAZARD & STRAUSE,
Solicitor for Appellee.

No. 2058

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,

Appellants,

vs.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,

Appellees.

APOSTLES ON APPEAL

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,

Appellants,

vs.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,

Appellees.

APOSTLES ON APPEAL

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

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In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees.

vs.

STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner,
Respondents and Appellants.

No. 4503.

NAMES AND ADDRESSES OF COUNSEL.

ROBERT McMURCHIE, Esq.,
Proctor for Respondent and Appellant, Everett, Washington.

E. C. MILLION, Esq.,
Proctor for Libellants and Appellees, 920 Alaska Building, Seattle, Washington.

J. P. HOUSER, Esq.,
Proctor for Libellants and Appellees, 920 Alaska Building, Seattle, Washington.

GEORGE FRIEND, Esq.,
Proctor for Libellants and Appellees, 920 Alaska Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees.

vs.

STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner, and D. NEESON,
Respondents and Appellants.

No. 4503.

STATEMENT.

TIME OF COMMENCEMENT OF SUIT.

January 16, 1911.

NAMES OF PARTIES TO SUIT.

Libelant: Alex Zueghoer, K. J. Johannson and Julius Johannson. Respondents: Steamship "Columbia" and James Barron, Owner.

DATES OF FILING RESPECTIVE PLEADINGS.

Libel filed January 16, 1911.
Appearance of Claimant filed March, 1911.
Answer of Appellant filed January 12, 1911.
Claimant's bond filed March 16, 1911.

REFERENCE TO COMMISSIONER.

Cause was referred to Commissioner A. C. Bowman, to take and report the testimony, and on June 5, 1911, said Commissioner duly returned into the Clerk's office his transcript of the testimony so taken.

TIME OF TRIAL.

This cause was submitted to the Honorable C. H. Hanford, Judge of the District Court, on testimony taken before a Commissioner and was by him taken under advisement and a Memorandum Decision on the Merits was handed down and filed on August 1, 1911.

DATE OF ENTRY OF DECREE.

A Memorandum Decision on the Merits was filed in the District Court on August 1, 1911, and the final decree was made and entered and filed in said District Court on October 2, 1911, and Notice of Appeal was filed in the District Court on October 12, 1911.

ROBERT McMURCHIE,
Proctor for Appellant.

In the District Court of the United States, Western District, Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON, *Libellants,* vs. STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner.	No. 4503.

Come now the libellants and for their cause of action herein allege and aver as follows:

1. That at all the times hereinafter mentioned, the Steamship "Columbia" was and now is a steamboat duly registered under the laws of the United States, and plying the waters

of Puget Sound, and was and now is within the jurisdiction of this Honorable Court.

2. That the defendant James Barron is now the owner and in the possession and control of said steamboat, which is now located at Everett, Washington.

3. That during the months of April, May, June and July, 1910, said steamboat was operated and owned by the Sound Motor Company, and engaged in commercial business in the waters of Puget Sound.

4. That during said times, the libellant Alex Zueghoer was employed as purser on said steamer by the then owner thereof at a salary of $75 per month, during which time said libellant earned as follows: In April $40, in May $75, in June $75, and July $39, making in all a total of $229, no part of which has ever been paid.

5. That during the time said steamship was so operated, the libellant K. J. Johannson was employed thereon as mate by said owners, for which he was to receive the sum of $105 per month, and during said employment said libellant earned and became entitled to wages as follows: In April, 1910, the sum of $105, in May, 1910, the sum of $50, making in all $155, no part of which has ever been paid.

6. That during the time said steamship was so operated libellant Julius Johannson was employed thereon as mate during the month of June, 1910, at the agreed rate of wages of $65 per month; said employment being in pursuance of a contract with the then owners of said steamship, no part of which has ever been paid.

7. That by reason of the above and foregoing facts, the laws of the United States and the laws of the State of Washington, said libellants are entitled to and have a lien upon said boat, together with her engines, boilers, tackle, furniture and apparel,—to secure the payment thereof,—all of which is within the jurisdiction of this Court.

Wherefore libellants pray for judgment and decree of this Court establishing their claim of lien against said boat and directing that same be sold to satisfy said lien, in pursuance of the laws, rules and practice of this Court in such cases made and provided.

MILLION & HOUSER and
GEO. FRIEND,
Proctor for Libellants, 920 Alaska Building, Seattle, Wash.

United States of America,
State of Washington,
County of King.—ss.

Julius Johannson, Alex Zueghoer and K. J. Johannson, being first duly sworn, upon his oath deposes and says that he is one of the libellants named in the foregoing libel; that he has heard said libel read, knows the contents thereof and believes the same to be true.

JULIUS JOHANNSON,
ALEX ZUGEHOER,
KARL J. JOHANNSON.

Subscribed and sworn to before me this 20th day of December, 1910.

E. C. MILLION,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Libel. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 16, 1911. R. M. Hopkins, Clerk.

In the District Court of the United States, Western District, Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON, and JULIUS JOHANNSON,
Libellants,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner.

No. 4503.

ANSWER.

To the Honorable C. H. Hanford, Judge of the District Court of the United States, for the Western District of Washington:

James Barron, owner and claimant of the steamer "Columbia," her engines, boiler, tackle, furniture and apparel as the same are proceeded against on the libel of Alex Zueghoer, K. J. Johannson and Julius Johannson, answers said libel and complaint as follows:

I.

The claimant admits the allegations contained in paragraphs 1, 2 and 3 of the libellants' cause of action herein.

II.

That the claimant denies the allegations contained in paragraph 4 of the libellants' cause of action herein, and each and every allegation therein contained, and specifically denies that there is due to the libellant Alex Zueghoer the sum of Two Hundred and Twenty-nine ($229.00) Dollars, or any part thereof.

III.

The claimant denies the allegations contained in paragraph 5 of the libellants' cause of action herein, and each and every allegation therein contained, and specifically denies that there is due to the libellant K. J. Johannson the sum of One Hundred and Fifty-five ($155.00) Dollars.

IV.

The claimant denies the allegations contained in paragraph 6 of the libellants' cause of action herein, and each and every allegation therein contained, and specifically denies that there is due to the libellant Julius Johannson the sum of Sixty-five ($65.00) Dollars, or any part thereof.

As and for a first affirmative defense, the claimant herein alleges as follows:

I.

That in the month of March, 1910, one James Good, then the owner of the said Steamer "Columbia," mortgaged same to the claimant herein, James Barron, for the sum of Ten Thousand Five Hundred ($10,500.00) Dollars, and in the said month of March, 1910, the said James Good did sell the said Steamer "Columbia" to the Sound Motor Company, a corporation, who assumed the mortgage of the claimant James Barron and agreed to pay same; that from and after the date of the purchase of the said Steamer "Columbia" by the Sound Motor Company, the said steamer remained in the possession of the Sound Motor Company until the 15th day of July, 1910, when default being made in the terms of the said mortgage, the said James Barron, the claimant herein, took possession of the said boat and took proceedings to foreclose his mortgage, and ever since said date has been the owner of said boat and been in possession of same.

II.

That during all the times that the said Sound Motor Company operated the said vessel, the libellants herein were officers and trustees of the said Sound Motor Company and had charge and management of the said Steamer "Columbia," running same and collecting the moneys earned by the said Steamer "Columbia" as such officers, and during such time the said Sound Motor Company allowed said boat to incur liabilities, and when the claimant herein, James Barron, took possession of the said boat in the month of July, 1910, liabilities amounting to over Fifteen Hundred ($1500.00) Dollars had been incurred on the faith and credit of the said Steamer "Columbia," and which sums the said James Barron was forced to pay in order to protect his mortgage security on the said Steamer "Columbia."

As and for a second affirmative defense to the claim of the libellant, K. J. Johannson, the claimant herein alleges:

I.

That the said K. J. Johannson entered into an agreement with the claimant herein, that on condition that the claimant would make certain repairs to the said steamboat "Columbia" and would continue to run the said steamboat for a short time on the run from Seattle to Bainbridge Island, where the said steamboat was running while in the possession of the Sound Motor Company, and would employ the said K. J. Johannson as one of the officers to run said boat, that he would release any claim or pretended claim which he might have against the said steamer "Columbia" for wages or otherwise up to the extent of Two Hundred ($200.00) Dollars; that the claimant herein pursuant to such agreement, expended a large sum of money in repairs to said steamboat "Columbia" under the direction of the said K. J. Johannson, exceeding in amount the sum of One Thousand ($1000.00) Dollars, and did employ the said K. J. Johannson to assist in running said boat for

him, and the said K. J. Johannson assisted in running the said boat until the 29th day of November, 1910, during all of which time the claimant herein paid wages of the said K. J. Johannson; that during all of said time, the said boat was not paying its operating expenses and said claimant herein lost by permitting the said boat to be run, a sum in excess of Five Hundred ($500.00) Dollars, all of which expenses were incurred for the purpose of enabling the libellants herein to interest parties with money to assist them in purchasing the said steamboat "Columbia" and paying the claim of the claimant herein.

As and for a third affirmative defense to the claim of the libellant, Alex Zueghoer, the claimant alleges as follows:

I.

That from and after the 15th day of July, 1910, the said libellant Alex Zueghoer was employed by the claimant herein to act as a purser on the said steamboat "Columbia" and during such times the said libellant Alex Zueghoer collected moneys from the passengers and for freight earned by the said steamboat "Columbia" belonging to the claimant herein, amounting to Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which the said Alex Zueghoer has made no accounting to the claimant herein and is indebted to the claimant herein in the said sum of Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which sum claimant asks judgment against the libellant Alex Zueghoer.

Wherefore, having fully answered, claimant prays that the libel of the libellants herein may be dismissed with costs.

ROBERT McMURCHIE,
Proctor for Claimant.

Western District of Washington.—ss.

James Barron, being first duly sworn, deposes and says: that he is the claimant above named; that he has read the

II.

That during all the times that the said Sound Motor Company operated the said vessel, the libellants herein were officers and trustees of the said Sound Motor Company and had charge and management of the said Steamer "Columbia," running same and collecting the moneys earned by the said Steamer "Columbia" as such officers, and during such time the said Sound Motor Company allowed said boat to incur liabilities, and when the claimant herein, James Barron, took possession of the said boat in the month of July, 1910, liabilities amounting to over Fifteen Hundred ($1500.00) Dollars had been incurred on the faith and credit of the said Steamer "Columbia," and which sums the said James Barron was forced to pay in order to protect his mortgage security on the said Steamer "Columbia."

As and for a second affirmative defense to the claim of the libellant, K. J. Johannson, the claimant herein alleges:

I.

That the said K. J. Johannson entered into an agreement with the claimant herein, that on condition that the claimant would make certain repairs to the said steamboat "Columbia" and would continue to run the said steamboat for a short time on the run from Seattle to Bainbridge Island, where the said steamboat was running while in the possession of the Sound Motor Company, and would employ the said K. J. Johannson as one of the officers to run said boat, that he would release any claim or pretended claim which he might have against the said steamer "Columbia" for wages or otherwise up to the extent of Two Hundred ($200.00) Dollars; that the claimant herein pursuant to such agreement, expended a large sum of money in repairs to said steamboat "Columbia" under the direction of the said K. J. Johannson, exceeding in amount the sum of One Thousand ($1000.00) Dollars, and did employ the said K. J. Johannson to assist in running said boat for

him, and the said K. J. Johannson assisted in running the said boat until the 29th day of November, 1910, during all of which time the claimant herein paid wages of the said K. J. Johannson; that during all of said time, the said boat was not paying its operating expenses and said claimant herein lost by permitting the said boat to be run, a sum in excess of Five Hundred ($500.00) Dollars, all of which expenses were incurred for the purpose of enabling the libellants herein to interest parties with money to assist them in purchasing the said steamboat "Columbia" and paying the claim of the claimant herein.

As and for a third affirmative defense to the claim of the libellant, Alex Zueghoer, the claimant alleges as follows:

I.

That from and after the 15th day of July, 1910, the said libellant Alex Zueghoer was employed by the claimant herein to act as a purser on the said steamboat "Columbia" and during such times the said libellant Alex Zueghoer collected moneys from the passengers and for freight earned by the said steamboat "Columbia" belonging to the claimant herein, amounting to Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which the said Alex Zueghoer has made no accounting to the claimant herein and is indebted to the claimant herein in the said sum of Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which sum claimant asks judgment against the libellant Alex Zueghoer.

Wherefore, having fully answered, claimant prays that the libel of the libellants herein may be dismissed with costs.

ROBERT McMURCHIE,
Proctor for Claimant.

Western District of Washington.—ss.

James Barron, being first duly sworn, deposes and says: that he is the claimant above named; that he has read the

II.

That during all the times that the said Sound Motor Company operated the said vessel, the libellants herein were officers and trustees of the said Sound Motor Company and had charge and management of the said Steamer "Columbia," running same and collecting the moneys earned by the said Steamer "Columbia" as such officers, and during such time the said Sound Motor Company allowed said boat to incur liabilities, and when the claimant herein, James Barron, took possession of the said boat in the month of July, 1910, liabilities amounting to over Fifteen Hundred ($1500.00) Dollars had been incurred on the faith and credit of the said Steamer "Columbia," and which sums the said James Barron was forced to pay in order to protect his mortgage security on the said Steamer "Columbia."

As and for a second affirmative defense to the claim of the libellant, K. J. Johannson, the claimant herein alleges:

I.

That the said K. J. Johannson entered into an agreement with the claimant herein, that on condition that the claimant would make certain repairs to the said steamboat "Columbia" and would continue to run the said steamboat for a short time on the run from Seattle to Bainbridge Island, where the said steamboat was running while in the possession of the Sound Motor Company, and would employ the said K. J. Johannson as one of the officers to run said boat, that he would release any claim or pretended claim which he might have against the said steamer "Columbia" for wages or otherwise up to the extent of Two Hundred ($200.00) Dollars; that the claimant herein pursuant to such agreement, expended a large sum of money in repairs to said steamboat "Columbia" under the direction of the said K. J. Johannson, exceeding in amount the sum of One Thousand ($1000.00) Dollars, and did employ the said K. J. Johannson to assist in running said boat for

him, and the said K. J. Johannson assisted in running the said boat until the 29th day of November, 1910, during all of which time the claimant herein paid wages of the said K. J. Johannson; that during all of said time, the said boat was not paying its operating expenses and said claimant herein lost by permitting the said boat to be run, a sum in excess of Five Hundred ($500.00) Dollars, all of which expenses were incurred for the purpose of enabling the libellants herein to interest parties with money to assist them in purchasing the said steamboat "Columbia" and paying the claim of the claimant herein.

As and for a third affirmative defense to the claim of the libellant, Alex Zueghoer, the claimant alleges as follows:

I.

That from and after the 15th day of July, 1910, the said libellant Alex Zueghoer was employed by the claimant herein to act as a purser on the said steamboat "Columbia" and during such times the said libellant Alex Zueghoer collected moneys from the passengers and for freight earned by the said steamboat "Columbia" belonging to the claimant herein, amounting to Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which the said Alex Zueghoer has made no accounting to the claimant herein and is indebted to the claimant herein in the said sum of Two Hundred Sixty-nine and 35-100 ($269.35) Dollars, for which sum claimant asks judgment against the libellant Alex Zueghoer.

Wherefore, having fully answered, claimant prays that the libel of the libellants herein may be dismissed with costs.

ROBERT McMURCHIE,
Proctor for Claimant.

Western District of Washington.—ss.

James Barron, being first duly sworn, deposes and says: that he is the claimant above named; that he has read the

foregoing answer, knows the contents thereof, and that the same is true to the best of his knowledge.

JAMES BARRON.

Subscribed and sworn to before me this 4th day of January, 1910.

(Seal) J. W. OYEN,

Notary Public in and for the State of Washington, residing at Everett, Washington.

Service of the within Answer admitted at Seattle this 12th day of January, 1911.

MILLION & HOUSER.

Indorsed: Answer of Claimant. Filed *nunc pro tunc* as of Jan. 12, 1911, per order dated August 8, 1911. R. M. Hopkins, Clerk.

United States District Court Western District of Washington. Northern Division.

ALEX ZUGEHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON,
Claimant.

No. 4503.
Filed Aug. 1, 1911.

MEMORANDUM DECISION ON THE MERITS.

This is a suit to collect wages for services as mariners in operating the steamboat Columbia. The owner has filed a

claim and bond for release of the vessel but has not filed an answer controverting the claims set forth in the libel. The testimony introduced squints at possible defenses not available to the claimant for the reason that without an answer those matters are not in issue.

By the libel and the uncontradicted evidence there appears to be due to the libellants, balances of unpaid wages as follows:

Julius Johannson	$65.00
K. J. Johannson	155.00
Alexander Zugehoer	225.00

I direct that a decree be entered in favor of the libellants for the several sums above stated, without interest and for costs.

C. H. HANFORD,
United States District Judge.

ADDENDA.

The claimant in support of a petition for a rehearing has submitted an answer which by endorsement thereon appears to have been served upon the proctor for the libellants in the month of January this year, and it appears that the failure to file it in the Clerk's office was an inadvertence.

Leave is hereby granted to file said answer and it will be considered as if filed on the date on which service was made.

By this answer three affirmative defenses are pleaded— the substance of the first is that, while the claimant held a mortgage upon the Columbia, the mortgagor sold her to a corporation of which the libelants were officers and trustees, and they operated her as a carrier of passengers and received her earnings; that said corporation assumed the mortgage debt and promised to pay it but has failed to do so; and that in the month of July, 1910, the corporation having made default in payments due, the claimant took possession of the boat which was then subject to liens amounting to $1,500 for debts

incurred in her operation under the management of the libellants.

The evidence proves that until the first day of July the boat was operated under the management of a man named Munks who received her earnings and there is no evidence tending to prove that either of the libellants were in any way responsible for any debts incurred in the operation of the boat which became liens or which the claimant was obliged to pay. There is no evidence to support a finding that either of the libellants as individuals or by reason of their association with the manager of the corporation became liable to the claimant for the mortgage debt or any part of it by virtue of any promise, or by reason of misconduct. Therefore this defense must fail.

The second affirmative defense pleads an agreement entered into between the libellant K. J. Johannson and the claimant whereby said libellant promised that on condition that the claimant would make needed repairs to the Columbia and continue to run her for a short time, said libellant would contribute from the wages due him the sum of $200.00, and that pursuant to said agreement the libellant expended for repairs under the direction of said libellant, a sum exceeding $1,000.00 and the boat was continued on her run as agreed, incurring a loss for operating expenses in excess of $500.00.

By the testimony including admissions of said K. J. Johannson, it appears that he did agree to contribute out of the wages due him, for repairing the boat, the sum of $100.00. At the time of entering into this agreement Johannson was captain of the boat and he had succeeded Munks as president of the corporation and he desired to keep the boat on the run in the expectation of affecting a sale which would be an advantage to him. Therefore, there was a valid consideration for the agreement and the amount of $100.00 will be deducted from the balance of wages which he earned, and the decree will award to him $55.00 instead of $155.00.

The third affirmative defense pleads that the libellant Zuge-

hoer acted as purser of the Columbia while she was on the run after the claimant took her into his possession, and that said libellant collected a sum of money which he has failed to account for.

By this defense the claimant assumed the burden of proving the account, which he has failed to do, and there is no evidence rebutting the testimony of said libellant to the effect that he disbursed all money received by him and that as to the particular items of disbursement which were questioned, the payments were authorized by the claimant.

Except as above indicated, the decree to be entered will be as heretofore directed.

C. H. HANFORD,
United States District Judge.

Indorsed: Memorandum Decision on the Merits. Filed in the U. S. District Court, Western Dist. of Washington, Aug. 1, 1911. R. M. Hopkins, Clerk.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner.
No. 4503.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having heretofore been duly and regularly submitted and the Court being fully advised in the premises, does hereby make the following Findings of Fact, to-wit:

I.

That at all times hereinafter mentioned the Steamship "Columbia" was and now is a steamboat duly registered under the laws of the United States and plying the waters of Puget Sound, and was at the time of the commencement of this action in the jurisdiction of this Court, and that after this action was started, claimant, James Barron, made claim to said steamship and furnished a bond as provided by law and the rules of this Court.

II.

That the Sound Motor Company, a corporation, purchased the said steamer "Columbia" in the month of March, 1910, from one James Good, and at the time of said purchase, said steamer was covered by a mortgage held by James Barron, the claimant herein, for the sum of Ten Thousand Five Hundred ($10,500.00) Dollars, which was then wholly unpaid, and the said Sound Motor Company did assume and agree to pay the said mortgage.

III.

That during the months of April, May, June and July, 1910, the said steamship "Columbia" was owned and operated by the said Sound Motor Company, a corporation, and engaged in the commercial business in the waters of Puget Sound.

IV.

That the libellant Alex Zueghoer was, prior to the purchase of the said steamship "Columbia" by the said Sound Motor Company, a stockholder in said Sound Motor Company and from and after July 1st, 1910, was the treasurer of the said Sound Motor Company.

V.

That during said times, the libellant, Alex Zueghoer, was employed by the Sound Motor Company as purser on the said

steamship, and that there is due and owing and unpaid to him as a balance from and on account of his services as such purser, the sum of Two Hundred and Twenty-nine ($229.00) Dollars.

VI.

That during the aforesaid times the libellant, K. J. Johannson, was employed by the Sound Motor Company to work on said boat as mate, for which there is remaining unpaid on account of his wages by the said Sound Motor Company, the sum of One Hundred and Fifty-five ($155.00) Dollars.

VII.

That the said Sound Motor Company and the officers thereof, from and after the month of March, 1910, operated the said steamship "Columbia" and incurred large liabilities thereon which the claimant James Barron was forced to pay, for the purpose of protecting his said mortgage, and the said mortgage being in default according to the terms thereof, the said James Barron, the claimant herein, took possession of said vessel on the 15th day of July, 1910, and proceeded to foreclose his mortgage and thereafter became the owner of said vessel and has been in possession of same.

VIII.

That said libellant K. J. Johannson stated to the said claimant, James Barron, that if he, the said James Barron, would continue the said "Columbia" on her then run after the said "Columbia" had been taken over from the said Sound Motor Company, that said libellant would contribute wages due to him for the repairing of said vessel in the sum of One Hundred ($100.00) Dollars, and that at the time of entering into said agreement, said libellant was captain of said vessel and had succeeded as president of said corporation and desired to keep said boat on said run.

IX.

That during the time aforesaid, the libellant Julius Johannson was employed thereon by the said Sound Motor Company at the agreed rate of wages of Sixty-five ($65.00) Dollars per month, and that by reason of such services, there is now due and owing to him by the said Sound Motor Company the sum of Sixty-five ($65.00) Dollars.

X.

That during all of the times mentioned all the libellants herein were stockholders and K. J. Johannson was one of the officers of the Sound Motor Company, a corporation, and the said libellant Alex Zueghoer, as an officer of the said Sound Motor Company, after July 1st, 1910, and while acting as purser on the said vessel, did collect moneys for the services rendered by the said vessel from passengers and for the carrying of freight, and did pay same over to the president of the Sound Motor Company, a corporation, and at the time of making said payments, the said Alex Zueghoer was the treasurer after July 1st, but purser at all times of the said Sound Motor Company and had charge of the receipts and disbursements of said corporation.

XI.

That the said Sound Motor Company did incur liabilities which were a charge upon the said steamer "Columbia" and which the claimant herein was forced to pay in a sum in excess of Fifteen Hundred ($1,500.00) Dollars, which sum the claimant was forced to pay in order to protect his mortgage security.

CONCLUSIONS OF LAW.

From the Findings of Fact and from the records and evidence in this action, the Court concludes as follows:

I.

That the libellant Alex Zueghoer is entitled to recover from the claimant and his bondsmen the sum of Two Hundred and Twenty-nine ($229.00) Dollars, without interest, to which conclusion of law the claimant excepted, which exception is allowed.

II.

That the libellant K. J. Johannson is entitled to recover the sum of Fifty-five ($55.00) Dollars only, without interest, for the reason that there is a valid consideration for his agreement with the claimant to contribute One Hundred ($100.00) Dollars towards the repairs of the Steamship "Columbia," by reason of which said claimant is entitled to an offset of One Hundred ($100.00) Dollars, to which conclusion of law the libellant excepted to the alllowance of said One Hundred ($100.00) Dollars, which exception is allowed.

III.

That the libellant Julius Johannson is entitled to judgment against the claimant and his bondsmen for the sum of Sixty-five ($65.00) Dollars, without interest, to which conclusion of law the claimant excepted, which exception is allowed.

IV.

That libellants have and recover herein their costs and disbursements to be taxed by the Clerk of this Court, to which conclusion of law the claimant excepted, which exception is allowed.

V.

That said libellants have a valid and subsisting lien upon said steamship "Columbia," which lien is in full force and effect, and the said claimant having filed his bond herein, libellants are entitled to judgment and execution against the

said claimant and his bondsmen for said amount, for all of which let the decree be entered, to which conclusion of law the claimant excepted, which exception is allowed.

DECREE.

By virtue of the law and by reason of the premises aforesaid, it is hereby ordered, adjudged and decreed:

That the libellants do have and recover of and from the claimant James Barron and D. Neeson, his bondsman herein, the following sums, to-wit:

I.

Libellant Alex Zueghoer the sum of Two Hundred and Twenty-nine ($229.00) Dollars.

II.

Libellant K. J. Johannson the sum of Fifty-five ($55.00) Dollars.

III.

Libellant Julius Johannson the sum of Sixty-five ($65.00) Dollars.

IV.

Libellants recover their costs and disbursements herein to be taxed by the Clerk of this Court.

V.

For all of which let execution issue against the goods and chattels of said claimant James Barron and said D. Neeson, his bondsman herein.

To all the foregoing the claimant James Barron excepts, which exception is hereby allowed.

Dated this 2nd day of October, 1911.

C. H. HANFORD, Judge.

O. K.

E. C. Million, Atty. for Libellant.

R. McMurchie, Atty. for Claimant.

Indorsed: Findings of Fact and Conclusions of Law, and Decree. Filed in the U: S. District Court, Western Dist. of Washington, Oct. 2, 1911. A. W. Engle, Clerk; F. A. Simpkins, Deputy Clerk.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner,
Respondent.
No. 4503.

To the said libellants Alex Zueghoer, K. J. Johannson and Julius Johannson, and to E. C. Million, their proctor, and to the Clerk of the above entitled Court:

You and each of you will please take notice, that James Barron, claimant of the said steamer "Columbia," and D. Neeson, his surety, hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the certain final decree made and entered by the above entitled Court in the above entitled cause on the 2d day of October, 1911.

Dated at Everett, Snohomish County, Washington, this 10th day of October, 1911.

JAMES BARRON,
DANL. NEESON,
ROBERT McMURCHIE,
Proctor for James Barron, Claimant of Steamer "Columbia," and D. Neeson, Surety.

VIII.

The Court erred in entering a decree in favor of libellant K. J. Johannson for the sum of Fifty-five ($55.00) Dollars.

IX.

The Court erred in entering a decree in favor of the libellant Julius Johannson in the sum of Sixty-five ($65.00) Dollars.

X.

The Court erred in entering a decree that the libellants recover their costs and disbursements.

XI.

The Court erred in directing that execution might issue against the goods of the claimant James Barron and D. Neeson, his bondsman.

XII.

The Court erred in not entering a decree dismissing the libel of the libellant Alex Zueghoer as to the said steamer "Columbia" and as to James Barron, the owner and claimant.

XIII.

The Court erred in not entering a decree dismissing the libel of the libellant K. J. Johannson as to the said steamer "Columbia" and as to James Barron, the owner and claimant.

XIV.

The Court erred in not entering a decree dismissing the libel of the libellant Julius Johannson as to the said steamer "Columbia" and as to James Barron, its owner and claimant.

ROBERT McMURCHIE,
Proctor for Appellants James Barron and D. Neeson.

Due service of a copy of the within Assignments of Error received and service of same acknowledged this 16th day of October, 1911.

MILLION & HOUSER,
Proctor for Libellants.

Indorsed: Assignment of Error. Filed in the U. S. District Court, Western District of Washington, Oct. 16, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUGEHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants,

vs.

THE STEAMER "COLUMBIA," Etc.,
Respondent,

JAMES BARRON,
Claimant.

No. 4503.

To the Honorable Judges of the above entitled Court:

Pursuant to the Order of Reference in the above entitled cause, I proceeded with the hearing of testimony on behalf of the libellants appearing by Mr. E. C. Million, their proctor, and the claimant appearing by Mr. Robert McMurchie, his proctor, as follows:

Evidence of K. J. Johannson, page 10, starting with line 24 to line 21 on page 11:

Q Did not you request Mr. Barron to allow the boat to remain on the run to enable you to give you a chance to sell

the boat, to see if you could not save the money out of the thing that way?

A I requested Barron to keep the boat on the run so that he could get a chance to sell the boat to get his money back. It was a better chance to sell the steamer in the summer than in the winter.

Q And so that you people could make something over and above the mortgage, what you could get out of the boat by running the boat?

A No sir.

Q You did not tell Barron that you could get about $2,500.00—that you could save that amount?

A No sir.

Q That you could sell the boat for that much more than the mortgage if he would let you run the boat on that run?

A No sir.

Q Never demanded that the boat should remain on the run?

A Yes, we desired the boat to remain on the run. I told Barron it was easier to sell the boat in the summer time than in the winter time, and he could sell that run with the boat, otherwise he had no chance to sell the boat at all. In the spring it would have been an easy matter to sell the boat and Mr. Barron would have got his money out of her.

Evidence of James Barron on page 33 to page 37, inclusive:

JAMES BARRON, claimant, being duly sworn, testified as follows:

Q (Mr. Lloyd) You are the owner of the steamer Columbia?

A Yes sir.

Q Were you the mortgagee of the steamer Columbia at the time the boat was sold by James Good to the Sound Motor Company?

A I was.

Q And remained such until you got possession of the boat, until the middle of July, 1910?

A Yes sir.

Q When did you first receive notice of the insolvency of the Sound Motor Company, and their inability to meet the mortgages?

A Along about the 10th of July.

Q From whom?

A Mr. Million.

Q What did you do?

A I came down and took possession of it along about the 14th or 15th.

Q And did you meet any of these libellants about this time, Mr. Zugehoer?

A Yes, I met all of them.

Q You met all the parties that are suing in this actioon, Mr. Zugehoer, Mr. K. J. Johannson and Julius Johannson?

A Yes sir.

Q Did you make any arrangements with them on what terms you would allow the boat to continue running on that run?

A No particular arrangements, no.

Q Well, when you took possession of the boat, under what terms was the boat to continue running?

A To give them a chance to buy the boat. They wanted me to run it for three months, they had a buyer at that time at the end of three months who would assist them to regain possession of it.

Q Was there any arrangement made with you that in case they did not make the sale, what you were to do? Were you to pay them a salary during that time?

A Yes, certainly.

Q You were to pay them a salary during the time the boat ran?

A Yes sir.

Q Did you do that?

A Yes sir.

Q As a condition for your allowing the boat to run did they make any concession as to arrears of salary?

A That was mentioned in an incidental way, it was not pressed.

Q Did they make any bargain with you that they would?

A Yes, Johannson made out a list of repairs on the boat which was costing me five or six hundred dollars, and offered to contribute to it I think about $100.00 if I would make them, which I did. Mr. Zugehoer he never seemed to care about time that way. I never expected the matter would be brought up at all, and they did not until I talked about taking the boat off and then it all appeared to be very important matter.

Q They led you to understand that they were negotiating trying to raise money, and that they were not going to make any claim for back pay?

A No. They were ambitious to own the boat at this time and kept still about this matter, and when they brought it up toward the last it was one of the inducements to make me take the boat off.

Q They did not make any claim at all against the boat until after they found they were not able to arrange to purchase?

A Well, they had mentioned it incidentally, but they never had pressed it at all.

Q And you paid them the wages all the time the boat was running?

A Yes, I allowed them to pay themselves most of the time.

Q Out of your money?

A Yes sir.

Q Did you do these repairs they asked you to do?

A Yes, I did.

Q During the time the boat was in their possession running three months, how much did the boat lose above the operating expenses?

A I could not tell you exactly, quite a few hundred dollars.

Q Four or five hundred?

A I think so, a good deal more than five hundred.

CROSS-EXAMINATION.

Q (Mr. Million) Did not the boys tell you all the time that if you would continue to keep this boat on the run, that they would waive any claim against the boat for wages?

A Yes, they had talked that way.

Q And in fact just about the time you took the boat off the run you asked them to sign a release?

A Yes sir.

Q And they said they would if you would keep the boat on the run, and if you would not they would not?

A Yes sir.

Q Now you understand that Mr. Munks, the old president of the company, had charge of the matters until about the first of July, don't you?

A Yes sir.

Q That at that time there was a reorganization by which Zueghoer and Johannson practically took charge of the officers of the company?

A I was told that after I got possession.

Q And it was just before you took possession of the boat that you discovered there was some three or four thousand dollars debts on the boat?

A Yes sir.

Q Which you had to pay up in order to save her?

A Yes sir.

Q Now you say that Johannson at one time suggested if you would make certain repairs that he would throw in his wages on it, did he?

A $100.00 I think he said, which I guess was about all that he claimed.

Q Did not he also say that if you kept the boat on the run—you do not remember that part of it?

A He said that, yes. He said that he expected to buy the boat himself, to keep it on the run at that time.

Q Well, he tried to raise money, he and his associates tried to raise money to buy the boat from you, didn't he?

A I do not know whether he did or not.

Q They represented to you that they tried?

A Yes, that they had a prospect.

RE-DIRECT EXAMINATION.

Q (Mr. Lloyd) Did you keep the boat on the run as long as you agreed to do in the first place, for three months?

A Oh yes, longer than that.

(Testimony of witness closed.)

MR. LLOYD: Claimant rests.

Evidence of Libellant Alex Zueghoer, pages 38, 39, 40 and 41.

LIBELLANTS' REBUTTAL.

ALEXANDER ZUGEHOER, recalled, testified in rebuttal as follows:

Q (Mr. Million) At the time that the boat was turned over to Barron, was the matter discussed of the wages owing to you and your two co-libellants?

A Yes sir.

Q Was he informed that you had claims for wages?

A Yes.

Q Did you at any time agree or say to him that you would waive your claim for wages on the boat?

A No.

CROSS-EXAMINATION.

Q (Mr. Lloyd) Did you ever tell him that if he would let the boat remain for three months that you would be able to secure a purchaser or ask him to allow the boat to remain for your benefit?

A I do not recollect having made such a statement.

Q Never made such a statement at all. Did you ever tell Barron that if he would allow the boat to remain on there that Gazzam would buy an interest in three months?

A No, I do not think I said any such thing. I said to Mr. Barron that I think Mr. Gazzam would help us to buy the boat.

Q That Gazzam would help you buy the boat. Did you tell Barron that Gazzam said he would have money in three months?

A I told him that he said he would probably be able to help within sixty days.

Q It was for the purpose of enabling you and your associates to get money to buy the boat, that Barron allowed the boat to remain?

A To enable us to continue to keep the boat running.

Q All Barron was asking was for the amount of the mortgage? He never asked for more than that. He just wanted you to pay up the amount of the mortgage?

A I do not think he ever mentioned that to me. I do not recollect that he wanted to sell the boat to us outright.

Q Did you tell Barron that the run was worth three thousand dollars to you?

A Yes sir.

Q And you told him that you wanted to protct that route?

A Yes sir.

(Testimony of witness closed.)

AFTERNOON SESSION.

ALEXANDER ZUGEHOER, on the stand for further direct examination.

Q (Mr. Million) What was the understanding between you and Barron about the payment of these wages?

A About the time that he took the Columbia over, I told him that there were back wages of the firemen, engineer, Johannson and myself, and we disputed the matter for awhile

and he paid the firemen and afterwards settled with the engineer, and he said he did not want to pay us our wages because we were stockholders of the company and he thought he did not have to pay us.

Q That was the excuse that he made for not paying your wages and Johannson's wages?

A Yes sir.

Q What did he say in that entire conversation?

A Before the boat was taken off I told him again that he ought to pay us our back wages, and he said since he paid his attorney to wind up the matter of the Columbia it would not be any additional expense to him to have this matter taken into Court, and that he would rather have it taken into Court than to pay us.

Q What was said, if anything, at that time about asking you to sign a release of your wages?

A We told him we did not want to sign.

Q State what he said, about the time he took the boat off the run, about signing a release?

A He came down there with a paper that he had written up and offered us part of our money, and wanted us to sign it and he would him if he would pay all our wages we would sign it, otherwise we would not. We wanted all the money that was coming to us, and that is the time when he said that he had paid his attorney any way to wind up the Columbia case and he would rather have it taken into Court than to pay it, as it would not be any additional expense to him.

(Testimony of witness closed.)

Evidence of K. J. Johannson, pages 42 and 43.

K. J. JOHANNSON, one of the libellants, recalled, testified as follows:

Q (Mr. Million) Mr. Barron testified that you showed him a list of repairs that you wanted made on the Columbia and that you stated in substance that if he would make the repairs you would give $100.00 of your wages. I wish you would state

the transaction, just how it occurred and what was said to you by him in regard to that?

A Well, I told Barron if he would keep the Columbia on the run I would give that much out of the back standing wages toward her repairs, if he wanted to keep the Columbia on the run during the winter, otherwise I wanted my money, and there was no more said about it.

Q How soon was that after he took the Columbia over?

A Well, that was I think some time in September.

Q Now about the time that he took the Columbia off the run, state what was said by him at the time he asked you to sign a release, and where that occurred?

A Well, it occurred on board the steamer on the run, I went down to the oil dock to get oil and Barron came on the boat down to the oil dock, and he said that he was willing to pay us twenty-five dollars each if we would sign a release to clear the boat.

Q What did you tell him?

A I told him no, I would not accept twenty-five dollars, I wanted the money coming to me.

CROSS-EXAMINATION.

Q (Mr. Lloyd) At the time he took the boat over in July, you thought that you would be able to find a purchaser for the boat on the run in three months?

A No sir.

Q Did not mention anything of that kind?

A No sir, never thought of such a thing.

Q Did not you tell him that you could get Gazzam to help you get the money in sixty days or three months?

A No sir, I told Barron we tried to get Gazzam interested in the boat. In fact I had several talks with Gazzam and I never stated any certain time or anything. I done all I could to help sell the boat.

(Testimony of witness closed.)

Testimony closed.

Indorsed: Testimony Reported by Commissioner. Filed in the U. S. District Court, Western Dist. of Washington, June 5, 1911. R. M. Hopkins, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees,

vs.

STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner, and D. NEESON,
Respondents and Appellants.

No. 4503.

ORDER ALLOWING APPEAL.

Whereas, an appeal has been made to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit of the United States, for a decree entered herein on the 2d day of October, 1911, and the Court being satisfied that the question there determined is one on which an appeal should be allowed;

Now, therefore, on application of the appellants, it is ordered, that the judgment and decree of this Court made and entered herein on the 12th day of October, 1911, against the appellants, and in favor of the appellees be revised in the matter of law by the Circuit Court of Appeals of the United States, in and for the Ninth Judicial Circuit, as provided by the rules and practice of that Court.

Let the Clerk within thirty days from this date prepare at the expense of the appellants, a certified copy of such decree

and of the record in this matter as returned into this Court, and of all matters pertinent to such order, and file the same with the Clerk of the United States Circuit Court of Appeals.

Witness the Honorable Cornelius H. Hanford, Judge of the said Court, and the seal thereof, in Seattle, on this 12th day of December, 1911.

(Seal)

Enter: C. H. HANFORD, Judge.
A. W. ENGLE, Clerk.
By F. A. SIMPKINS, Deputy.

Indorsed: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 12, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner.
} No. 4503.

BOND ON APPEAL.

Know all men by these presents, that we, James Barron and D. Neeson as principals, and Charles Hove and N. A. Munro as sureties, are held and firmly bound unto Alex Zueghoer, K. J. Johannson and Julius Johannson in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said Alex Zueghoer, K. J. Johannson and Julius Johannson,

their heirs, executors, administrators and assigns as their interest may appear, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of October, 1911.

Whereas, lately, at a District Court for the United States, for the Western District of Washington, Northern Division, in a suit pending in said District, between Alex Zueghoer, K. J. Johannson and Julius Johannson as libellants, and the steamer "Columbia" respondent, whereof James Barron is claimant, a decree was rendered against the said James Barron and D. Neeson as surety and in favor of the said libellants, and the said James Barron and D. Neeson having filed in the office of the Clerk of said District Court, and served on the proctors for libellants in said cause, a notice signed by said James Barron and D. Neeson that they appeal to the United States Circuit Court of Appeals, for the Ninth Circuit from said decree.

Now, therefore, the condition of this obligation is such, that if the above named principals shall prosecute their appeal to effect and pay the costs if said appeal is not sustained, and if said principal will abide by and perform whatever decree may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit in said cause, or on a mandate of said United States Circuit Court of Appeals by said District Court of the United States, for the Western District of Washington, Northern Division, then this obligation to be void, otherwise to remain in full force and virtue.

JAMES BARRON. (Seal)
DANL. NEESON. (Seal)
N. A. MUNRO. (Seal)
CHARLES HOVE. (Seal)

United States of America,
Western District of Washington.—ss.

Charles Hove and N. A. Munro, being first duly sworn, each for himself on oath, deposes and says: that he is one of the sureties in the foregoing bond, and is a resident householder and freeholder within the said Western District of Washington, and worth the amount specified in said bond over and above all his debts and liabilities, exclusive of property exempt from execution.

N. A. MUNRO.
CHARLES HOVE.

Subscribed and sworn to before me this 10th day of October, 1911.

J. W. OYEN,
Notary Public in and for the State of Washington, residing at Everett, Snohomish County.

The foregoing bond is hereby approved this 11th day of October, 1911.

(Seal)

C. H. HANFORD,
U. S. District Judge.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Oct. 16, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees,

vs.

STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner, and D. Neeson,
Respondents and Appellants.

No. 4503.

STIPULATION.

It is stipulated, by and between Robert McMurchie, proctor for the appellant James Barron, and E. C. Million, proctor for the appellees herein, Alex Zueghoer, K. J. Johannson and Julius Johannson, as follows:

That the apostles herein shall contain the following and no more:

A caption exhibiting the proper style of the Court and the title of the cause, and a statement showing the time of the commencement of the suit; names of the parties; the several dates when the respective pleadings were filed; the time when the trial was had and the name of the Judge hearing same; the libel of the libellants; the answer of the appellant James Barron; the two memorandum decisions of the Honorable C. H. Hanford, Trial Judge; the Findings of Fact and Conclusions of Law and Decree of the Trial Judge; the Notice of Appeal; the Assignments of Error; Bond on Appeal; and the following portions of the evidence taken before the Commissioners:

Evidence of K. J. Johannson, page 10, starting with line 24 to line 21 on page 11; the evidence of James Barron on

page 33 to page 37 inclusive, and the evidence of the libellant Alex Zueghoer, pages 38, 39, 40 and 41; the evidence of K. J. Johannson, pages 42 and 43; and it is conceded by and on behalf of both parties herein, that a proper notice of appeal and bond has been given in the above entitled case, and that the appellant James Barron filed his claim as required by law to the said boat, and furnished a bond as required by law to abide by the judgment and decree of the Court in said matter.

Dated this 21st day of November, 1911.

ROBERT McMURCHIE,
Proctor for Appellant James Barron.
MILLION & HOUSER,
Proctor for Appellees Alex Zueghoer, K. J. Johannson and Julius Johannson.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 7, 1911. A. W. Engle, Clerk. F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees,
vs.
STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner,
Respondents and Appellants.
No. 4503.

CLERK'S CERTIFICATE.

United States of America,
Western District of Washington.—ss.

I, A. W. Engle, Clerk of the District Court of the United States, for the Western District of Washington, do hereby certify the foregoing 40 printed pages, numbered from 1 to 40, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause as is called for by the Praecipe of the Proctor for Appellant, as the same remain of record and on file in the office of the Clerk of the said Court, and that the same constitutes the Apostles on Appeal from the Order, Judgment and Decree of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify that I hereto attach and herewith transmit the Original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing Apostles is the sum of $54.75 and that the said

sum has been paid to me by Robert McMurchie, Proctor for Defendant and Appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 8th day of January, 1912.

(Seal) A. W. ENGLE, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Libellants and Appellees,

vs.

STEAMSHIP "COLUMBIA" and JAMES BARRON, Owner, and D. NEESON,
Respondents and Appellants.

No. 4503.

CITATION ON APPEAL OF JAMES BARRON.

To Alex Zueghoer, et al.:

The President of the United States of America, to Alex Zueghoer, et al., the above named libellants and appellees, Greeting:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, for the Western District of Washington, Northern Division, in the above entitled cause, wherein James

Barron and Dan Neeson are appellants, and you and each of you are appellees, to show cause, if any there be, why the decree entered and rendered in the above entitled cause on the 2d day of October, 1911, against the said appellants should not be corrected and why speedy justice should not be done in the premises on that behalf.

Witness the Honorable C. H. Hanford, Judge of the United States District Court, for the Western District of Washington, Northern Division, this 12th day of December, A. D. 1911.

(Seal) Enter: C. H. HANFORD,
District Judge.

Attest: A. W. ENGLE, Clerk.
By F. A. SIMPKINS, Deputy.

Indorsed: No. 4503. Original. U. S. Circuit Court of Appeals for the Ninth Circuit. Alex Zueghoer, et al., Libellants and Appellees, vs. Steamship "Columbia," Respondents and Appellants. Citation on Appeal of James Barron. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 12, 1911. A. W. Engle, Clerk. By F. A. Simpkins, Deputy. R. McMurchie, Everett, Washington, Atty. for Appellant.

NO. 2058

United States Circuit Court of Appeals

For the Ninth Circuit

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,

Appellants,

vs.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,

Appellees.

Brief on Behalf of Appellants

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

ROBERT McMURCHIE,
Proctor for Appellant.
Everett, Washington.

Herald Press, Everett, Wash.

NO. 2058

United States Circuit Court of Appeals
For the Ninth Circuit

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,

Appellants,

vs.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

STATEMENT

This matter comes before this Court on the appeal of James Barron from the judgment of the District Judge herein. The trial was had before the referee, the evi-

VIII.

"That said libellant K. J. Johannson stated to the "said claimant, James Barron, that if he, the said James "Barron, would continue the said 'Columbia' on her then "run after the said 'Columbia' has been taken over from "the said Sound Motor Company, that said libellant "would contribute wages due to him for the repairing of "said vessel in the sum of One Hundred ($100.00) Dol-"lars, and that at the time of entering into said agree-"ment, said libellant was captain of said vessel and had "succeeded as president of said corporation and desired "to keep said boat on said run.

IX.

"That during the time aforesaid, the libellant Julius "Johannson was employed thereon by the said Sound "Motor Company at the agreed rate of wages of Sixty-five "($65.00) Dollars per month, and that by reason of such "services, there is now due and owing to him by the said "Sound Motor Company the sum of Sixty-five ($65.00) "Dollars.

X.

"That during all of the times mentioned all the libel-"lants herein were stockholders and K. J. Johannson was "one of the officers of the Sound Motor Company, a cor-"poration, and the said libellant, Alex Zueghoer, as an "officer of the said Sound Motor Company, after July "1st, 1910, and while acting as purser on the said vessel, "did collect moneys for the services rendered by the "said vessel from passengers and for the carrying of "freight, and did pay same over to the president of the "Sound Motor Company, a corporation, and at the time "of making said payments, the said Alex Zueghoer was the "treasurer after July 1st, but purser at all times of the

"said Sound Motor Company and had charge of the re-
"ceipts and disbursements of said corporation.

XI.

"That the said Sound Motor Company did incur lia-
"bilities which were a charge upon the said steamer
"Columbia' and which the claimant herein was forced to
"pay in a sum in excess of Fifteen Hundred ($1,500.00)
"Dollars, which sum the claimant was forced to pay in
"order to protect his mortgage security.

CONCLUSIONS OF LAW

"From the Findings of Fact and from the records and
"evidence in this action, the Court concludes as follows:

I.

"That the libellant Alex Zueghoer is entitled to re-
"cover from the claimant and his bondsmen the sum of
"Two Hundred and Twenty-nine ($229.00) Dollars, with-
"out interest, to which conclusion of law the claimant
"excepted, which exception is allowed.

II.

"That the libellant K. J. Johannson is entitled to
"recover the sum of Fifty-five ($55.00) Dollars only, with-
"out interest for the reason that there is a valid consid-
"eration for his agreement with the claimant to contri-
"bute One Hundred ($100.00) Dollars towards the repairs
"of the steamship 'Columbia,' by reason of which said
"claimant is entitled to an offset of One Hundred
"($100.00) Dollars, to which conclusion of law the libel-
"lant excepted to the allowance of said One Hundred
"($100.00) Dollars, which exception is allowed.

III.

"That the libellant, Julius Johannson, is entitled to "judgment against the claimant and his bondsmen for the "sum of Sixty-five ($65.00) Dollars, without interest, to "which conclusion of law the claimant excepted, which "exception is allowed.

IV.

"That libellants have and recover herein their costs "and disbursements to be taxed by the Clerk of this Court, "to which conclusion of law the claimant excepted, which "exception is allowed.

V.

"That said libellants have a valid and subsisting lien "upon said steamship 'Columbia,' which lien is in full force "and effect, and the said claimant having filed his bond "herein, libellants are entitled to judgment and execution "against the said claimant and his bondsmen for said "amount, for all of which let the decree be entered, to "which conclusion of law the claimant excepted, which "exception was allowed.

DECREE

"By virtue of the law and by reason of the premises "aforesaid, it is hereby ordered, adjudged and decreed:

"That the libellants do have and recover of and from "the claimant James Barron and D. Neeson, his bondsman "herein, the following sums, to-wit:

I.

"Libellant Alex Zueghoer the sum of Two Hundred and "Twenty-nine ($229.00) Dollars.

II.

"Libellant K. J. Johannesson the sum of Fifty-five "($55.00) Dollars.

III.

"Libellant Julius Johannesson the sum of Sixty-five "($65.00) Dollars.

IV.

"Libellants recover their costs and disbursements "herein to be taxed by the Clerk of this Court.

V.

"For all of which let execution issue against the goods "and chattels of said claimant James Barron and said D. "Neeson, his bondsman herein.

"To all the foregoing the claimant James Barron "excepts, which exception is hereby allowed.

"Dated this 2nd day of October, 1911.

"C. H. HANFORD, Judge."

The facts respecting the controversy as they appear from the evidence taken before the referee and returned by him to the District Judge, and as set forth in the appostles on appeal and the Findings of Fact of the trial Judge are briefly as follows:

That the steamer "Columbia," a boat duly registered under the laws of the United States, plying the waters of Puget Sound, was within the jurisdiction of this Court, and after the action started with James Barron as claimant, made claim to the boat and furnished a bond as

required by law; that in the month of March, 1910, one James Good, then the owner of the said boat sold same to the Sound Motor Company, a corporation, and at that time the said steamer "Columbia" was covered by a mortgage held by the appellant James Barron, on which there was unpaid the sum of Ten Thousand Five Hundred ($10,500) Dollars, and this sum the Sound Motor Company agreed to pay as part of the consideration for the purchase of the boat; that the appellee Alex Zueghoer was a stockholder in the Sound Motor Company at the time of the purchase of the said boat, and that after the 1st of July, 1910, he became a trustee and treasurer in the said Sound Motor Company, and that the Sound Motor Company employed him as purser on the said vessel; that the appellee K. J. Johannson was a stockholder in the said Sound Motor Company at the time of the purchase of the said steamer "Columbia" and became a trustee and officer in the said corporation after the 1st day of July, 1910; that the appellee Julius Johannson was a stockholder of said Sound Motor Company at the time of the purchase of the said vessel and was employed by the said Sound Motor Company to work on said vessel.

The Findings of Fact also show, that during the time that the boat was run by the Sound Motor Company and prior to the foreclosure of his mortgage by the said appellant, the appellee Alex Zueghoer was the purser on the said boat and as such, collected the moneys for the ser-

vices rendered by the boat for carrying passengers and freight, and paid the moneys received by him to the president of the Sound Motor Company, although at the time of making the payments to the president of the Sound Motor Company, he was the treasurer of the said corporation. The Findings of Fact also show, that the Sound Motor Company by running the said boat incurred large liabilities amounting to the sum of Fifteen Hundred ($1500.00) Dollars, which sum the appellant was obliged to pay, and did pay, in order to protect his mortgage on the said vessel. In July, 1910, the mortgage being in default, the appellant took possession of the boat and the evidence shows that the appellees in this case induced the appellant to allow them to run the boat, hoping to secure a purchaser for same. During the time that they ran the boat, they incurred liabilities which the appellant was obliged to pay, amounting to the sum of about Five Hundred ($500.00) Dollars, and during all the times their wages for running the boat were paid by the appellant.

The question involved in this appeal is, whether under the facts as so disclosed, the appellees are entitled to a lien on the steamer "Columbia" for the wages which were due to them for working for the Sound Motor Company, while the Sound Motor Company was the owner of the vessel.

ASSIGNMENTS OF ERROR

I.

The Court erred in finding as a Conclusion of Law from

the Findings of Fact entered, that the libellant Alex Zueghoer was entitled to recover from the claimant and his bondsman the sum of Two Hundred and Twenty-nine ($229.00) Dollars without interest.

II.

The Court erred in finding that the libellant K. J. Johannson was entitled to recover the sum of Fifty-five ($55.00) Dollars, without interest, against claimant and his bondsman.

III.

The Court erred in finding that the libellant Julius Johannson was entitled to a judgment against the claimant and his bondsman for the sum of Sixty-five ($65.00) Dollars, without interest.

IV.

The Court erred in entering a decree that the libellants should have and recover their costs and disbursements herein.

V.

The Court erred in finding that the libellants have a valid and subsisting lien upon the steamer "Columbia."

VI.

The Court erred in finding that the libellants were entitled to judgment and execution against the claimant and his bondsman for the amounts of the liens.

VII.

The Court erred in entering a decree in favor of the libellant Alex Zueghoer for the sum of Two Hundred and Twenty-nine ($229.00) Dollars.

VIII.

The Court erred in entering a decree in favor of libellant K. J. Johannson for the sum of Fifty-five ($55.00) Dollars.

IX.

The Court erred in entering a decree in favor of the libellant Julius Johannson in the sum of Sixty-five ($65.00) Dollars.

X.

The Court erred in entering a decree that the libellants recover their costs and disbursements.

XI.

The Court erred in directing that execution might issue against the goods of the claimant James Barron and D. Neeson, his bondsman.

XII.

The Court erred in not entering a decree dismissing the libel of the libellant Alex Zueghoer as to the said steamer "Columbia" and as to James Barron, the owner and claimant.

XIII.

The Court erred in not entering a decree dismissing the libel of the libellant K. J. Johannson as to the said

steamer "Columbia" and as to James Barron, the owner and claimant.

XIV.

The Court erred in not entering a decree dismissing the libel of the libellant Julius Johannson as to the said steamer "Columbia" and as to James Barron, its owner and claimant.

ARGUMENT

These assignments of error present to this Court the question whether the appellees are entitled to a lien upon the steamer "Columbia."

Remington & Ballinger's Codes and Statutes of the State of Washington, Section 1182, provides that all vessels, steamers, etc., are liable:

"1. For services rendered on board at the request of, "or under contract with their respective owners, charter- "ers, masters, agents or consignees."

The record in this case shows clearly, that the appellees herein were all employed by the Sound Motor Company; were all stockholders in the Sound Motor Company at the time of the purchase by the Sound Motor Company of the vessel in question; that as such, they were aware of the fact that the Sound Motor Company did not pay for the vessel entirely; that at the time of the purchase by the said Company, a mortgage existed on the boat in favor of the appellant herein, and the Sound Motor Com-

pany having made default in the payment of the wages which it agreed to pay to its stockholders, and one of the appellees being a trustee in the Sound Motor Company at all the times, and the other trustee after the 1st day of July, 1910.

It is contended on behalf of the appellant in this case, that it would be a gross fraud on the appellant to allow the appellees, when the corporation in which they were stockholders having assumed and agreed to pay for the mortgage of the appellant, should be permitted, not only to incur large liabilities which were a claim against the boat, and which the appellant had to pay, but that in addition to the officers so running the vessel, incurring these liabilities, that they should be permitted now to claim a lien upon the vessel, which is the only security which the appellant has for his mortgage.

It is submitted that at the time the appellees started to work on the steamer "Columbia," they did not start to work on the faith and credit of the vessel, but on the faith and credit of the corporation in which they were stockholders, and it would not be equitable to allow them to claim a lien upon the vessel while they were stockholders in the corporation which incurred the liability in question, any more than it would be to allow an owner of a vessel to mortgage same and to thereafter claim wages on the vessel for the work rendered by him on the

vessel, and claim that in priority to the mortgage which he had given.

The case of Scott vs. Failes, 5 Ben. 82, holds, that a cook hired on the exclusive credit of the master, has no lien on the vessel for his wages.

The case of Crusador, 1 Ware 437, and Packard vs. The Louisa, 2 Wood. & M. 54, show that seamen hired by the master who look to him for remuneration, have no lien on the vessel for their wages.

The same section of the law under which the appellees claim a lien upon the vessel, gives a material man a lien for supplies furnished; and this Court in the case of Alaska & P. S. Steamship Co. vs. Chamberlain, 116 Fed., p. 600, following cases cited therein, holds that there can be no lien unless it is contemplated by both parties at the time of the transaction, evidenced either by express words to that effect, or by circumstances of such a nature as to justify the inference, that the goods were sold upon the credit of the vessel, and upon the part of the purchaser to pledge the vessel, and unless this was so, then the seller of the goods had no lien upon the vessel.

We submit that in this case the same rule of law applies and there certainly can be no understanding upon the part of the trustees or stockholders of a corporation that they should have a lien upon the vessel for their wages, taking priority over a mortgage over the vessel

placed there with their knowledge at the time that they started to work on the vessel.

It is respectfully submitted that the order of the District Court should be reversed, that it should be decreed that the appellees have no lien whatever upon the steamer "Columbia" for any wages for work rendered by them on the vessel while same belonged to the Sound Motor Company.

Respectfully submitted,

ROBERT McMURCHIE,

Proctor for Appellant.

407 American National Bank Bldg.,
Everett, Washington.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,

Appellants,

vs.

ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,

Appellees.

No. 2058

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

MILLION & HOUSER,
GEO. FRIEND,
Proctors for Appellees.

Seattle.

Rust-Murphy Company, Seattle

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEAMSHIP "COLUMBIA," Etc., and JAMES BARRON, Owner,
Appellants,
vs.
ALEX ZUEGHOER, K. J. JOHANNSON and JULIUS JOHANNSON,
Appellees.
No.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF APPELLEE.

We submit that not only have appellants failed to give any sound or valid reason why the decree should be reserved but that upon their own statement. We are entitled to have it affirmed.

We know of no law, rule or reason why appellees should be deprived of a lien because they were stockholders in the corporation that hired them and operated the steamer.

We contend that as this appeal results in a trial *de novo*, the evidence shows that the Trial Court erred in allowing claimant a credit of one hundred dollars.

On page 26 of record is to be found the testimony of claimant, who says the libellant K. J. Johannson offered to contribute about $100 to repairs.

Again, on page 27, the claimant says: "$100, I *think* he said, which I guess was about all that he claimed."

Also that it was all conditioned on the boat being kept on the run.

Libellant Johannson testified as follows concerning the application of back wages to repairs:

"Well, I told Barron if he would keep the Columbia on the run I would give that much out of the back standing wages towards her repairs, if he wanted to keep the Columbia on the run during the *winter*, otherwise I wanted my money, and there was no more said about it" (Record, page 31).

The boat was on the run after claimant took it

over in July for a period of three months, which would mean about the last of October.

Now, here is the waivering, uncertain statements of Barron as to the terms and conditions of the applying the back wages to repairs as against the plain and explicit statement of libellant that such application was to be made if the boat was kept on the run all winter.

The burden of proof was on claimant, and we submit that he failed by a fair preponderance of the testimony to show that the wages were to be unconditionally applied to repairs.

We respectfully submit that thus not only should the decree be affirmed, but that as to the $100 it should be modified by allowing such amount.

MILLION & HOUSER,
GEO. FRIEND,
Proctors for Libellants.

Seattle.

No. 2066

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 2066

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of said Deceased,
Plaintiff.

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Names and Addresses of Attorneys.

W. H. PLUMMER and HENRY JACKSON DARBY, 1201-1202 Old National Bank Building, Spokane, Washington,
Attorneys for Plaintiff.

W. W. COTTON, ARTHUR C. SPENCER, RALPH E. MOODY, of Portland, Oregon, and SAMUEL R. STERN, Columbia Building, Spokane, Washington,
Attorneys for Defendants [1*]

*Page number appearing at foot of page of original certified Record.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Amended Complaint.

Comes now the above-named plaintiff and files and serves this his amended complaint, and alleges:

I.

That on the 4th day of February, 1911, letters of administration upon the estate of the said C. Roy Lamphere, deceased, were duly issued by the Superior Court of the State of Washington, in and for the County of Spokane, to the plaintiff, by which he was appointed administrator of all of the goods, and credits belonging to the said C. Roy Lamphere at the time of his death, and that during all the times since he has been and now is, the duly appointed, qualified and acting administrator of the estate of the said C. Roy Lamphere, deceased, and brings this action against the above-named defendants as such

administrator as the personal representative of said deceased for the benefit of the surviving widow and minor child of the said C. Roy Lamphere, deceased, to wit, Viola Lamphere, and Paul Lamphere. [1½]

II.

That the Oregon Railroad & Navigation Company was at the time of the happening of the injury and death hereinafter pleaded, a railroad corporation, created, organized and existing under and by virtue of the laws of the State of Oregon, and engeged in, and doing business as a common carrier of freight and passengers by railroad between the States of Oregon, Washington and Idaho.

III.

That at the time of the happening of the injury and death to C. Roy Lamphere, and immediately prior thereto, he was engaged in the performance of his duty in the employment of said Oregon Railroad & Navigation Company, and doing and performing exclusively the acts and things necessary and proper to be done in the performance of his said duties in obedi*a*nce to the orders of said company, and as a part of the necessities and requirements of said company, in aid of, and as a part of the operation of its cars, engines and trains in carrying on its business of interstate commerce by railroad.

IV.

That the Oregon-Washington Railroad & Navigation Company is a Corporation created, organized and existing under and by virtue of the laws of the State of Oregon, and subsequent to the happening of the injury and death to said C. Roy Lamphere herein

mentioned, took over all of the property and interests of the said Oregon Railroad & Navigation Company, and assumed all of its rights, interests and obligations.

V.

That on, to wit, December 1st, 1910, and for a long time prior thereto, said Oregon Railroad & Navigation Company, hereinafter designated in this complaint as "The Company," maintained, owned and operated its line of railroad through [2] and within the city of Tekoa, Washington, and had provided, maintained and operated therein, in addition to its main line of track, certain sidetracks, depot grounds, yards, switches and other appliances.

VI.

That on, to wit, the 1st day of December, 1910, said company provided and maintained across its numerous tracks near the north end of its passenger station, a certain footpath, extending from a foot-bridge situated on the west side of said yard, across said tracks past the north end of its passenger station connecting with one of the principal thoroughfares in the said city on the east side of said yard, which footpath was on said day, and had been for a number of years prior thereto, used continuously by some of the employees of said company, including said C. Roy Lamphere, in the performance of their duties, and other pedestrians, commonly, generally and notoriously, in walking from a west side portion of said town to said passenger station and other parts of said company's yard and to other parts of said town.

VII.

That at the time of the happening of the injury and death to said C. Roy Lamphere, hereinafter referred to, and for a long time prior thereto, he was in the employ of said company as a locomotive fireman, and resided in said city of Tekoa in the western portion of said town and westerly from the yard and passenger station of said company, and his duties as such fireman required him to respond at any time of the day or night when he should be called upon by said company to perform any of his duties assigned him from time to time.

VIII.

That said footpath crossing said tracks and yard, as aforesaid, was so commonly and frequently used, as aforesaid, [3] that said company and its employees operating, using and switching cars and making up trains in said yard, would so arrange said trains and cars, that an opening would always be left between the ends of the cars so as to provide a passageway between said cars, upon said footpath, so as to enable said footpath to be used as aforesaid, and it was also the custom and practice of said company that before any of said cars on either side of said footpath would be coupled together or jammed together for any purpose, a brakeman, switchman or other employee would be placed upon said footpath crossing so as to warn pedestrians and other employees of said company and prevent injuries by the coming of said cars.

IX.

That on said first day of December, 1910, at about

7:15 P. M. of said day, in said town of Teoka, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3, which train was due at 7:45 P. M. of said day, and was an interstate train and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No. 522, which engine was pulling a train of cars engaged at the time in interstate commerce by railroad.

X.

That immediately after receiving said order mentioned in the proceeding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon said train to relieve the said fireman as aforesaid, and for that purpose he proceeded along and upon said footpath upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts in performing his duty as a fireman for said company in its [4] service in carrying on its business of an interstate common carrier by railroad.

XI.

That while passing upon and along said footpath as aforesaid he attempted to pass through between two cars that had been left on either side of said footpath, and in the space intervening between said two cars provided for that purpose, and while so attempting to pass through between said cars on said footpath, using all reasonable care and caution in so

doing, said company, through its agents, servants and employees, handling the cars of the company engaged in intersate commerce, and without giving any warning to said Lamphere of its intention so to do, carelessly, negligently and recklessly, suddenly and violently forced said two cars together, catching the person of said Lamphere between the bumpers or knuckles on the end of said cars, crushing, maining and wounding him so badly and to such an extent that he died within a very short time thereafter, and during the same day.

XII.

That the proximate and immediate cause of the death of said Lamphere was due wholly and exclusively to the negligence, carelessness and recklessness on the part of said company, its agents and servants in not using reasonable care and caution to prevent the injury to said Lamphere in backing, shoving and forcing said cars together upon said footpath, and failing to give said Lamphere any warning or notice of its intention so to do, and in not maintaining any lookout or flagman or other employee at said point on said footpath, so as to warn said Lamphere of its intentions and acts in the premises.

XIII.

That by reason of the death of said C. Roy Lamphere, and of the negligence, carelessness and recklessness on the [5] part of said company, said Viola Lamphere, as his widow, and Paul Lamphere, as his minor child, and this plaintiff as administrator of the estate of C. Roy Lamphere, and as his personal repre-

sentative, have been damaged in the sum of Fifty Thousand ($50,000.00) Dollars, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the above-named defendants, and each of them, for the sum of Fifty Thousand ($50,000.00) Dollars, and for his costs and disbursements herein.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

State of Washington,
County of Spokane,—ss.

W. H. Plummer, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in the above-entitled cause, and makes this verification on behalf of plaintiff for the reason that said plaintiff is at present not within the State of Washington; that he has read the foregoing amended complaint, knows the contents thereof, and that the same is true as he verily believes.

(Signed) W. H. PLUMMER.

Subscribed and sworn to before me this 21st day of July, 1911.

(Signed) FRED J. CUNNINGHAM,
Notary Public Residing at Spokane, Washington.

[Endorsements]: Service admitted this 21st day of July, 1911.

(Signed) SAMUEL R. STERN,
Attorney for Defendants.

Amended Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington, July 21, 1911. Frank C. Nash, Clerk. [6]

In the Superior Court of the State of Washington, in and for the County of Spokane.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Demurrer [of Oregon R. R. & Nav. Co.].

Comes now the Oregon Railroad & Navigation Company, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff on file herein upon the ground:

That the complaint of the plaintiff fails to state facts sufficient to constitute a cause of action against this defendant.

W. W. COTTON,
ARTHUR C. SPENCER,
SAMUEL R. STERN,
RALPH E. MOODY,
Attorneys for the Defendant Oregon Railroad & Navigation Company.

Due service of the within demurrer, by a true copy thereof, is hereby admitted at Spokane, Washington,

this —— day of March, A. D. 1911.

W. H. PLUMMER,
Attorney for Plaintiff.

Filed March 22, 1911, at 1:20 o'clock P. M. Glenn B. Derbyshire, Clerk. By Otto W. Blenner.

[Endorsements]: Filed as part of the Defendant's Transcript of Record on Removal from State Court to Federal Court, in the U. S. Circuit Court for the Eastern Dist. Wash. Apr. 17, 1911. F. C. Nash, Clerk. [7]

In the Superior Court of the State of Washington, in and for the County of Spokane.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Demurrer [of Oregon-Washington R. R. & Nav. Co.].

Comes now the Oregon-Washington Railroad & Navigation Company, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff on file herein upon the ground:

That the complaint of the plaintiff fails to state facts sufficient to constitute a cause of action against this defendant.

W. W. COTTON,
ARTHUR C. SPENCER,
SAMUEL R. STERN,
RALPH E. MOODY,
Attorneys for Defendant Oregon-Washington Railroad & Navigation Company.

Due service of the within demurrer, by a true copy thereof, is hereby admitted at Spokane, Washington, this —— day of March, A. D. 1911.

W. H. PLUMMER,
Attorney for Plaintiff.

Filed March 22, 1911, at 1:20 o'clock P. M. Glenn B. Derbyshire, Clerk. By Otto B. Blenner, Deputy.

[Endorsements]: Filed as part of the Defendant's Transcript of Record on Removal from State Court to Federal Court, in the U. S. Circuit Court for the East. Dist. of Wash. Apr. 17, 1911. Frank C. Nash, Clerk. [8]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Opinion.

W. H. PLUMMER, for Plaintiff.

W. W. COTTON, RALPH E. MOODY and SAMUEL R. STERN, for Defendants.

RUDKIN, District Judge.—On the first day of December, 1910, C. Roy Lamphere, a resident of Tekoa, Washington, was in the employ of the Oregon Railroad & Navigation Company as a locomotive fireman. On the evening of that day he received orders from his superior officers to board a west-bound train at Tekoa, as a part of a dead-head crew, and to proceed thence westerly to a certain town, there to relieve an engine crew which had been constantly employed for more than sixteen hours on an engine hauling an interstate train. On the way from his home to the depot at Tekoa for the purpose of taking the

train as directed, Lamphere was crushed between two cars and received injuries from which he thereafter died. The present action is prosecuted by his personal representative under the Employers' Liability Act of 1908 (36 Stat. 65) to recover damages for his death, and the sufficiency of the complaint to bring the [9] case, within the provisions of that act is challenged by demurrer.

Section one of the act declares, "that every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee to his or her personal representative," etc. Subsequent sections abrogate or materially modify the defenses which have heretofore been available to defendants in this class of actions.

It was conceded on the argument, by counsel for both parties, that the deceased was killed through the negligence of his fellow-servants, and that the complaint states no ground of recovery at common law. In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations of the complaint clearly show that the deceased and the servants whose negligence caused his death were fellow-servants of a common master at the time of the injury, within the rule which has long prevailed in the federal courts.

Dayton Coal & Iron Co. vs. Dodd, 188 Fed. 597, and cases cited.

If a right of recovery exists in this case, there-

fore, it must exist by virtue of the above act of Congress. It will be seen at a glance that in order to bring a case within the provisions of that act two things must concur. First. At the time of inflicting the injury the railroad company must have been engaged in interstate commerce, and, second, at the time of receiving the injury the injured employee must have been employed by the railroad company in interstate commerce. Such is the language of the act itself and such is the construction it must receive at the hands of the Courts in order to keep it within the pale of the Federal Constitution; for, whatever [10] differences of opinion may have existed among the several Judges of the Supreme Court, in the Employers' Liability Cases, 207 U. S. 463, they were all agreed that the power of Congress to regulate the relation of employer and employee, or of employees between themslves, under the commerce clause of the Federal Constitution, is limited to employers engaged in interstate commerce and to their employees employed in such commerce. Thus, in the majority opinion the present Chief Justice said:

"The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.

Again, addressing himself to the argument that the language of the act should be restricted to rail-

roads actually engaged in interstate commerce, and to employees actually employed in such commerce, the same learned Judge said:

"So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and that the words 'any employee' as found in the statute should be held to mean any employee when such employee engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it."

In his dissenting opinion Mr. Justice Moody said:

"At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and that I understand that to be the opinion of every member of the court."

In his dissenting opinion, Mr. Justice Harlan said:

"Mr. Justice McKenna and myself are of opinion that it was within the power of Congress to prescribe, as between an interstate commerce carrier and its employees, the rule of liability established by the act of June 11, 1906. But we do not concur in the interpretation of that act as given in the opinion delivered by Mr. Justice White, but think that the act, reasonably and properly interpreted, applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to

employees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the State in which the wrong or injury occurred." [11]

In Adair vs. United States, 208 U. S. 161, 177, the Court said:

"So, in reference to *Employers' Liability Cases,* 207 U. S. 463, decided at the present term. In that case the Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability, as between interstate carriers and its employees in such interstate commerce, in cases of personal injuries received by employees while actually engaged in such commerce. The decision on this point was placed on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would, therefore, be within the competency of Congress to establish for commerce among the States, but not as to commerce completely internal to a State. Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In St. Louis, I. M. & S. Ry. Co. vs. Conley, 187 Fed. 949, Judge Riner, speaking for the Circuit Court of Appeals for the Eighth Circuit, said:

"In considering the act of 1906, * * * in the Employers' Liability Cases, * * * the Supreme

Court sustained the authority of Congress, under its power to regulate interstate commerce, to prescribe the rule of liability as between interstate carriers and their employees in such interstate commerce in cases of personal injuries received by employees while actually engaged in such commerce, basing its conclusions, as we understand the case, on the ground that a rule of that character would have direct reference to the conduct of interstate commerce, and would therefore be within the power of Congress to establish. But as the act included not only this class of employees, but all employees, many of whom were not actually engaged in the movement of interstate commerce, it was held that Congress had exceeded the power conferred upon it by the commerce clause of the Constitution. The act of 1908 provides that every common carrier by railroad, while engaged in interstate commerce, shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, or in case of the death of such employee 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, *warfs*, or other equipment.' This statute is in derrogation of the common law, and it must be conceded that such statutes must be construed strictly; but, as suggested by Chief Justice Parker in Gibson vs. Jenney, 15 Mass. 205, 'they are also to be construed sensibly and with a view to the object aimed at by the legis-

lature.' The primary object of the act was to promaote the safety of employees of railroads while actively engqged in the movement of interstate commerce, and is well calculated to subserve the interests of such commerce, by affording such **[12]** protection; there being, as it seems to us, a substantial connection between the object sought to be attained by the act and the means provided to accomplish that object.''

While the statute is in derogation of the common law and must be strictly construed, it is nevertheless apparent that Congress intended to exert its authority over the subject matter embraced in the act to the fullest extent, and it is the duty of the Courts to bring within its protection every employee of interstate railroads who can justly be said to be employed in interstate commerce at the time of receiving an injury. But giving to the statute this broad and liberal interpretation, it is still manifest that a vast majority of the army of men employed by the interstate railroads of the country in their different departments are so remotely and indirectly connected with the movement of interstate commerce that it is without the power of the Federal Government to regulate their relations to their employers or to each other. Men engaged in the manufacture of ties or steel rails which may ultimately be used in the construction of interstate railroads are not employed in interstate commerce; men employed in the building of cars or in the construction of railroads fall within the same category. It would also seem that men employed in the repair of en-

gines or cars which have been removed from the service, or in the general maintenance or repair of railroads used indiscriminately in intrastate and interstate commerce are not employed in interstate commerce, although there is a diversity of opinion on this question.

Peterson vs. Delaware, L. & W. R. Co., 184 Fed. 737, and cases there cited.

To hold that persons so generally employed are employed in interstate commerce would seem to be an unwarranted invasion of the police power of the State under the guise of commercial regulations. There is no real or substantial relation between such employments and the commerce regulated. **[13]** Adair vs. United States, *supra*. As said in the Conly case, *supra*, the primary object of the act was to promote the safety of employees of railroads while actively engaged in the movement of interstate commerce, and it may well be doubted whether the provisions of the act can be extended so as to include employees not so engaged. It would be unwise and impracticable to attempt in advance to draw an arbitrary line between those who are employed in interstate commerce and those who are not, as each case depends in a large measure upon its own circumstances and such questions must be met and solved as they arise. For the purposes of this case I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot, for the purpose of taking a train to a distant point, as a part of a dead-head crew, there to fire an engine hauling an interstate train, employed

in interstate commerce. Indeed, he is not employed in commerce of any kind. His employment is only constructive at best and such employment does not satisfy the requirements of this act.

The demurrer is therefore sustained, and the case will be stricken from the trial calendar where it was placed subject to the ruling on the demurrer.

[Endorsements]: Opinion. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 13th, 1911. Frank C. Nash, Clerk. **[14]**

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Order [Sustaining Demurrers, etc.].

This cause coming on to be heard on defendant's demurrer to plaintiff's amended complaint, and after argument by counsel and the matter having been taken under advisement by the Court, and the Court

having heretofore rendered its opinion thereon, which opinion has been filed with the clerk of this court, and the Court being fully advised in the premises,

It is hereby ORDERED that said demurrers of defendants to plaintiff's amended complaint be, and the same are hereby, sustained, to all of which plaintiff excepts and exceptions are allowed.

It is further ORDERED that the setting of this case be, and the same is hereby, vacated.

Done in open court this 16th day of October, 1911.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Sustaining Demurrers to Plaintiff's Amended Complaint. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 16, 1911. Frank C. Nash, Clerk. **[15]**

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Judgment and Order.

This cause coming on to be heard this 16th day of October, 1911, the above-named plaintiff appearing by W. H. Plummer and Henry Jackson Darby, his attorneys, and the defendant appearing by W. W. Cotton, Ralph E. Moody and Samuel R. Stern, and it appearing to the Court from the records and files in this cause that the demurrers heretofore interposed to plaintiff's amended complaint by the defendants, upon the ground that said amended complaint does not state facts sufficient to constitute a cause of action against defendants, were heretofore sustained by this Court, to all of which plaintiff excepted and exceptions allowed, and thereafter on this date the plaintiff refused to plead further herein, and upon said refusal to plead further in this cause,

It is hereby ORDERED and ADJUDGED: That plaintiff take nothing by this action, this action be, and the same is hereby, dismissed, and that defendant shall recover their **[16]** costs and disbursements herein.

To all of which plaintiff excepts and exceptions are allowed.

Done in open court this 17th day of October, 1911.

(Signed) FRANK H. RUDKIN,
Judge.

O. K. as to form.

(Signed) PLUMMER,
Atty. for Plaintiff.

[Endorsements]: Service admitted this 14th day of October, 1911.

(Signed) S. R. STERN,
Attorney for Defendants.

Judgment and Order. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 17, 1911. Frank C. Nash, Clerk. **[17]**

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Assignment of Errors.

Comes now P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, the plaintiff in the above-entitled action, and makes and files the following assignments of error in said cause, which said plaintiff and plaintiff in error will rely upon in the United States Circuit Court of Appeals

for the Ninth Judicial Circuit for relief from and a reversal of *of* the judgment entered in said cause in the court below, to wit:

I.

That the said Court erred in *in* sustaining the demurrers interposed by defendants and defendants in error to the amended complaint filed in said cause, and by holding and deciding that the facts stated in said amended complaint filed were not sufficient to constitute a cause of action against said defendants and defendants in error. **[18]**

II.

That the Court erred in dismissing the action of plaintiff and in rendering judgment for defendants.

WHEREFORE, the said plaintiff in error prays that the judgment of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, be reversed and that the said Circuit Court be directed to overrule the demurrers of said defendants and defendants in error.

(Signed) W. H. PLUMMER,
(Signed) H. J. DARBY,
Attorneys for Plaintiff in Error, Plaintiff in the Lower Court.

Service admitted this 18th day of October, 1911.

(Signed) SAMUEL R. STERN,
Attorney for Defendants.

[Endorsements]: Assignment of Errors. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. **[19]**

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by his attorneys, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court for the Eastern District of Washington, Eastern Division, at the April term thereof, 1911, manifest error hath happened to the great damage of this plaintiff.

Your petitioner further respectfuly shows that he has this day filed herewith his Assignment of Errors committed by the court below in said cause and intended to be urged by your petitioner and plain-

tiff in error in the prosecution of this, his suit in error. **[20]**

WHEREFORE, said plaintiff prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond, and for such other orders and process as may cause the same to be corrected by the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 17th day of October, 1911.

(Signed) W. H. PLUMMER and
H. J. DARBY,
Attorneys for Plaintiff.

Service admitted this 18th day of October, 1911. Further notice of application waived.

(Signed) SAMUEL R. STERN (M. C.),
Attorney for Defendants.

[Endorsements]: Petition for Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. **[21]**

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Order Allowing Writ of Error, etc.

P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, having this day filed his petition for a writ of error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of error within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error.

Now, therefore, it is ORDERED, that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the

Ninth Judicial Circuit, the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be, and hereby is, fixed at Five Hundred ($500.00) Dollars.

Dated this 18th day of October, 1911.

(Signed) FRANK H. RUDKIN,
Judge. [22]

[Endorsements]: Order Allowing Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [23]

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Writ of Error [Original].

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the Circuit Court of the

United States, for the Eastern District of Washington, Eastern Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between P. L. Lamphere as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, plaintiff in error, and Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, plaintiff [24] in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 17th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and

according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and eleven.

[Seal] FRANK C. NASH,

Clerk of the United States Circuit Court for the Ninth Circuit, Eastern District of Washington, Eastern Division.

Allowed by:

FRANK H. RUDKIN,

District Judge. [25]

[Endorsed]: In the Circuit Court of the United States for and Within the Eastern District of Washington, Eastern Division. P. L. Lamphere, Admr., Plaintiff, vs. Oregon Railroad & Navigation Co., a Corporation, et al., Defendants. Writ of Error. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 18, 1911. Frank C. Nash, Clerk. ————————, Dep.

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, as principal, and Massachusetts Bonding and Insurance Company, a corporation established under the laws of the Commonwealth of Massachusetts and having its principal office in Boston in said Commonwealth, as surety, are held and firmly bound unto the Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, and each of them, in the full and just sum of Five Hundred ($500.00) Dollars, to be paid to them, their successors or assigns,

for the payment of which well and truly to be made we bind ourselves and each of us and our, and each of our assigns, successors and administrators jointly and severally firmly by these presents.

Sealed with our hands and dates this 18th day of October, 1911. [26]

WHEREAS, lately, in the Circuit Court of the United States, in and for the Eastern District of Washington, Eastern Division, in an action pending in said court between P. L. Lamphere as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, as plaintiff, and the Oregon Railroad & Navigation Company, a corporation, and the Oregon-Washington Railroad & Navigation Company, a corporation, as defendants, a judgment of dismissal was rendered in favor of said defendants and against plaintiff, and costs of action, and the said plaintiff has obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a citation directed to the said above-named defendants, citing and admonishing them to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of this obligation is such that if the said P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, shall prosecute his said Writ of Error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall

be void, otherwise the same shall remain in full force and effect.

Signed P. L. LAMPHERE.
Administrator of the Estate of C. Roy Lamphere.
Signed MASSACHUSETTS BONDING AND INSURANCE COMPANY.
By ROBERT W. GRINELL.
Attorney in Fact.
Attest: HENRY J. WARD.
Attorney in Fact.

[Seal of Corporate Surety Company.]

The above and foregoing bond approved this 18th day of October, 1911.

Signed FRANK H. RUDKIN.
Judge. [27]

[Endorsements]: Bond on Writ of Error. Filed in the U. S. Circuit Court for the Eastern District of Washington. October 18th, 1911. Frank C. Nash, Clerk. [28]

In the Circuit Court of the United States, for the Eastern District of Washington, Eastern Division.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff.

vs.

OREGON RAILROAD & NAVIGATION COMPANY, a Corporation, and the OREGON-

WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants.

Citation [Original].

United States of America,—ss.

The President of the United States to the Oregon Railroad & Navigation Company, a Corporation, and the Oregon-Washington Railroad & Navigation Company, a Corporation, and to W. W. Cotton, Arthur G. Spencer, Samuel R. Stern, and Ralph E. Moody, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Washington, Eastern Division, wherein P. L. Lamphere, as administrator of the estate of C. Roy Lamphere, deceased, and as the personal representative of said deceased, is plaintiff in [29] error, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 18th day of October, 1911, and of the

Independence of the United States the one hundred and thirty-fifth.

FRANK H. RUDKIN,
United States District Judge, Presiding in the Circuit Court.

[Seal] Attest: FRANK C. NASH,
Clerk. [30]

Service admitted this 18th day of October, 1911.

SAML. R. STERN,
Attorney for Defendants.

[Endorsed]: In the Circuit Court of the United States for and Within the Eastern District of Washington, Eastern Division. P. L. Lamphere, Admr., Plaintiff, vs. Oregon Railroad & Navigation Co., a Corporation et al., Defendants. Citation. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Oct. 18, 1911. Frank C. Nash, Clerk.

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. Roy LAMPHERE, Deceased, and as the Personal Representative of said Deceased,
Plaintiff,

vs.

OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of record to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, of the following: Amended Complaint, Demurrers to Amended Complaint, Opinion Sustaining Demurrers to Amended Complaint, Order Sustaining Demurrers to Amended Complaint, Judgment of Dismissal, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error, Writ of Error, Bond on Writ of Error and Citation.

Dated this 18th day of October, 1911.

(Signed) W. H. PLUMMER,
Attorney for Plaintiff.

[Endorsements]: Praecipe for Transcript of Record. Filed in the U. S. Circuit for the Eastern District of Washington, October 18, 1911. Frank C. Nash, Clerk. [31]

[Certificate of Clerk U. S. Circuit Court to Record, etc.]

In the Circuit Court of the United States for the Eastern District of Washington, Eastern Division.

No. 1551.

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of said Deceased,
Plaintiff,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and the OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),
Defendants.

United States of America,
Eastern District of Washington,
State of Washington,—ss.

I, Frank C. Nash, Clerk of the Circuit Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages, numbered from one to thirty-one, inclusive, constitute and are true and correct copies of the Amended Complaint, Demurrers of Defendants to said Amended Complaint, Opinion of the Court Sustaining said Demurrers, Order Sustaining Demurrers, Judgment of Dismissal, Assignment of Errors, Petition for Writ of Error, Order Allowing Writ of Error and Bond on Writ of Error, as the same remain on file and of record in said Circuit

Court, and that the same, which I transmit, constitutes my return to the annexed Writ of Error, lodged and filed in my office on the 18th day of October, 1911.

I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and [32] certifying said record amounts to the sum of $15.70, and that the same has been paid in full by the attorneys for the plaintiff in said action.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, at the City of Spokane, in said Eastern District of Washington, in the Ninth Judicial Circuit, this 24th day of October, A. D. 1911, and the Independence of the United States of America the One Hundred and Thirty-sixth.

[Seal] FRANK C. NASH,

Clerk, U. S. Circuit Court for the Eastern District of Washington. [33]

[Endorsed]: No. 2066. United States Circuit Court of Appeals for the Ninth Circuit. P. L. Lamphere, as Administrator of the Estate of C. Roy Lamphere, Deceased, and as the Personal Representative of Said Deceased, Plaintiff in Error, vs. The Oregon Railroad & Navigation Company (a Corporation), and the Oregon-Washington Railroad & Navigation Company (a Corporation), Defendants in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

Filed November 9, 1911.

FRANK D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 2066.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

P. L. LAMPHERE, as Administrator of the Estate of C. ROY LAMPHERE, Deceased, and as the Personal Representative of Said Deceased,

Plaintiff in Error,

vs.

THE OREGON RAILROAD & NAVIGATION COMPANY (a Corporation), and THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Defendants in Error.

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington.
Eastern Division.

BRIEF OF PLAINTIFF IN ERROR

W. H. PLUMMER *and*
HENRY JACKSON DARBY,
Attorneys for Plaintiff in Error.
Spokane, Washington.

FRANKLIN PRESS, SPOKANE

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STATEMENT.

The writ of error in this case brings up for review the action of the lower Court in sustaining the demurrers of defendants to the amended complaint, and dismissing plaintiff's action.

The demurrers are identical, and set up but *one ground,* namely, that the complaint does not state sufficient facts to constitute a cause of action.

The defendants' demurrers were to the original complaint. Thereafter an amended complaint was filed, and it was agreed that the original demurrers should stand as demurrers to the amended complaint.

The complaint, so far as material to this appeal, alleges, in substance, that Lamphere was a locomotive fireman in the employ of the defendant Oregon Railroad & Navigation Company; that his duties required him to respond at any time when ordered so to do; that on December 1, 1910, at about 7:15 p. m., he was ordered by defendant to proceed from his home to the depot, secure proper transportation, board an interstate train which was due at 7:45 p. m., and proceed to a certain town, and (as stated by the Court in its opinion, R. p. 12) relieve an engine crew which had been continuously employed for more than sixteen hours on an engine hauling an interstate train.

That after receiving said order, Lamphere, in the performance of his duties, hastened to the depot of the

company, and had reached a crossing in the yards of defendant where the cars were cut, when without warning they were suddenly closed by reason of other cars being carelessly and negligently kicked against the cars on the north side of said crossing, and that Lamphere sustained injuries which resulted in his death; that Lamphere at the time of sustaining his injuries and the persons who caused his death, were employed by defendant in its interstate business, and that at all times mentioned in the complaint Lamphere was doing exclu sively things necessary in the performance of his duties, in obedience to orders, and which were in aid of, and made necessary by, the business of defendant as a common carrier of interstate commerce by railroad. (R. p. 2 et seq.) The complaint also alleges that after the accident the above-named defendant transferred all its property to the Oregon-Washington Railroad & Navigation Company, and that the said grantee assumed and agreed to pay all the obligations and liabilities of the grantor.

ASSIGNMENTS OF ERROR.

Plaintiff's Assignments of Error are two:

1. That the Court erred in sustaining the demurrers of defendants and in holding and deciding that the amended complaint does not state facts sufficient to constitute a cause of action.

2. That the Court erred in dismissing the action

of plaintiff and rendering judgment for defendants. (R. pp. 2-3-4.)

ARGUMENT.

The Court below held that decedent at the time of receiving his injuries was not protected by the Federal Employers' Liability Act; that he was killed through the negligence of fellow servants, and that said Act, which eliminates the defense of negligence of fellow servants, being inapplicable, no action could be maintained.

The conclusions of the eminent trial judge are stated with characteristic clearness. He says:

"For the purposes of this case, I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot, for the purpose of taking a train to a distant point, as a part of a dead-head crew, there to fire an engine hauling an interstate train, employed in interstate commerce. Indeed, he is not employed in commerce of any kind. His employment is only constructive at best, and such employment does not satisfy the requirements of this act." (R. pp. 19-20.)

The learned judge avoided the unfortunate expression which has been used by some of the Courts in construing the Employers' Liability Act. The employee not only does not *engage* in interstate commerce, but, as *an employee,* it is impossible for him to *engage* in it, by railroad, or otherwise. He may put fuel into his engine, he may switch cars, load or unload interstate freight.

drive an engine hauling an interstate train, or be otherwise *engaged* in the performance of his particular functions. But he is never, as an employee, engaged in interstate commerce. *This is done, and can only be done by the master.* The master, *while engaging* in the business of interstate commerce by railroad, *employs* firemen, engineers, brakemen and other persons. These persons *engage* in the discharge of their duties, or in their respective trades, and are *employed* by the master in carrying on his business of interstate commerce.

The Act applies to common carriers by railroad while engaging in interstate commerce, and to persons employed by them in such commerce.

All this is not only implicit in the declaration of the Court, that Lamphere, at the time of sustaining his injuries, was not "*employed* in interstate commerce," but may be easily deduced from the Act. Indeed, the Act itself so states in unequivocal terms.

Therefore, what we must first determine is, Was decedent, at the time he sustained his injuries, *employed* by defendant in interstate commerce?

The Employers' Liability Act of 1908 (35 U. S. Stat. at L. 65, c 149), is entitled "An Act relating to the liability of Common Carriers by railroad to their employees in certain cases."

Section 1 of said Act provides:

"That every common carrier by railroad *while engaging* in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury *while he is EMPLOYED by such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

As before stated, it is apparent that the employee does not *engage* in interstate commerce. It is the *master* who engages in such commerce. "* * * every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable, etc."

The person injured need only be employed, i. e., USED, *by the carrier in carrying on its business of interstate commerce.* That is to say, the servant at the time of his injury must be doing something for the master which relates to, is connected with, or which is in aid of, the interstate business of the master. If at the time of an injury the servant is performing duties which relate solely to *intra*state commerce, the Act does not apply. But if at the time he is part of the

vast machinery necessary to carry on *inter*state commerce, the Act does apply.

This conclusion is rendered unescapable by a consideration of the meaning of the word "employed". The word, as used in the Act, is the third person, singular number, present tense, *passive* voice, indicative mood, of the verb "employ."

In Webster's International Dictionary (Revised and Enlarged Edition of 1891, published by G. & C. Merriam & Co.), "Employ" is defined as follows:

"To *use;* to have in service; *to cause to be engaged in doing something;* * * * *to make use of* * * * *for a specific purpose;* to have or keep at work; to give employment or occupation to; *to intrust with some duty or behest.*"

In Murray's New English Dictionary, which is now being published under the auspices of the University of Oxford, the following definition is given:

"3. *To USE the service of* (*a person*) *in a professional capacity, or IN THE TRANSACTION OF SOME SPECIAL BUSINESS*: *to have or maintain* (*persons*) *in one's service.*"

Therefore, what Congress meant by the words "shall be liable in damages to any person suffering injury while he is EMPLOYED by such carrier in such commerce", was, that the carrier should be liable to *every* person suffering injury *while such person was*

used by the carrier, while he was in the service of the carrier, while he was engaged in doing something for the carrier, while he was made use of by the carrier, while he was performing some duty which had been required of him by such carrier, so long as the things done by the employee were in aid of, or incidental to, or necessary, expedient, or desirable in carrying on, the interstate business of such carrier.

Now let us see what is alleged in the complaint. In paragraph III., it is alleged:

"That at the time of the happening of the injury and death of C. Roy Lamphere, and immediately prior thereto, he was engaged in the performance of his duty in the employment of said Oregon Railroad & Navigation Company, and doing and performing exclusively the acts and things necessary and proper to be done in the performance of his said duties, in OBEDIENCE TO THE ORDER OF SAID COMPANY, AND AS A PART OF THE NECESSITIES AND REQUIREMENTS OF SAID COMPANY, IN AID OF, AND AS A PART OF THE OPERATION OF ITS CARS, ENGINES AND TRAINS IN CARRYING ON ITS BUSINESS OF INTERSTATE COMMERCE BY RAILROAD." (R. p. 3.)

In paragraph VII. it is alleged that decedent was at the time of the injury, and for a long time prior thereto, had been, a locomotive fireman in the employ of the Oregon Railroad & Navigation Company, and that *"his duties as such fireman required him to respond at any time of the day or night when he should be called upon*

by said company to perform any of his duties assigned him from time to time." (R. p. 5.)

In paragraph IX., it is alleged:

"*That on said first day of December,* 1910, *at about* 7:15 *p. m. of said day, in said town of Tekoa, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3, which train was due at* 7:45 *p. m. of said day, and was an INTERSTATE train, and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No.* 522, *WHICH ENGINE WAS PULLING A TRAIN OF CARS ENGAGED AT THE TIME IN INTERSTATE COMMERCE BY RAILROAD.*" (R. pp. 5-6.)

(Tekoa, Washington, is a division point of the Company. An immaterial mistake was made by the stenographer in transcribing her notes. Decedent was not to go to Spokane, but to a small town west of Tekoa, for the purpose, as stated in the opinion of the Court (R. p. 12), of relieving "*an engine crew which had been constantly employed for more than sixteen hours on an engine hauling an interstate train.*")

In paragraph X it is alleged that:

"*That immediately after* receiving said order mentioned in the preceding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon said train to relieve the said fireman as aforesaid, and for that purpose *he proceeded along and upon said footpath upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts*

in performing his duty as a fireman for said company in its service in carrying on its business of an interstate common carrier by railroad.'' (R. p. 6.)

And then it is alleged that while on his way to the depot and while using a footpath across the company's tracks, which was used by the company's employees, and by the public generally, and where the company always cut the cars for the passage of pedestrians, the company, without giving any warning of its intention so to do, suddenly, carelessly, recklessly and negligently kicked other cars against the cars next to the crossing and crushed decedent; that no bell was rung or whistle sounded; that no flagman was at this crossing *which was used by decedent and other employees of the company in the performance of their duties* and the general public of Tekoa, and vicinity; that the crossing above referred to was the crossing used by decedent and citizens generally in going from the west side of Tekoa where decedent resided to the railway station of defendant.

Was not the decedent USED by the defendant in carrying on its business of interstate commerce. Are not sufficient facts alleged which if true (and they must be taken as true when subjected to demurrer) would entitle plaintiff to recover?

An interstate train must be moved; the crew hauling such train can work no longer, or the defendant will be liable to heavy penalties; *defendant's duties required*

him to respond at any hour of the day or night; the master orders him to leave his home and wife and baby, and to bring the train forward. Obedient to defendant's command he starts out in the performance of his duty. What duty? For what purpose? *For the purpose of bringing an interstate train on to its destination.* Was he not USED by the carrier in interstate commerce? Was he not injured while he was in the service of the carrier, and in the performance of duties in aid of interstate commerce? Was he not doing something for the carrier, something necessary to carrying on its business of interstate commerce? Was he not injured while performing a duty which had been required of him by such carrier, *and did not that duty, as alleged in the complaint, relate exclusively to, and was it not made necessary by, the interstate business of the carrier?* If not, to what kind of business? *Intrastate?* There is not a single word in the complaint about *intra*state business or commerce. *The train which plaintiff was to board was an interstate train; the train on which he was to work was an interstate train; the train by which he was killed was engaged in interstate commerce.* He was obeying the command of the master. The work in hand was to bring this interstate train on to its destination. He was told to help in this work. And to bring this train on, it was just as necessary that decedent should go to the depot and get his pass, as it would have been for him to put coal into the furnace of the engine after

he should have boarded it, had he not been killed. He was one of the means used by the master to move this interstate train. The master decided upon what was necessary to be done, issued the necessary orders, and when decedent met his death, he was acting in obedience to the same.

In the brief which defendants submitted to the lower Court appear the following words:

"Keep in mind the thought that the Act was passed for the benefit of train crews while engaged in moving trains carrying interstate freight. The particular hazard connected with this kind of work is what prompted the passing of the Act. Under the allegations of the complaint, the employee was not at the time of his death engaged in interstate commerce within the contemplation of the Act * * *."

If the Act was passed merely for the benefit of train crews while engaged in moving trains carrying interstate freight, Congress certainly chose inapt words wherewith to express its will.

The original Employers' Liability Act of 1906 (34 Stat. at L. 232, c. 3073) provided, among other things, that *every* common carrier *engaged in interstate commerce* "shall be liable to ANY of its employees, or, in case of his death, to his personal representative * * * for all damages, etc." Congress showed no disposition there to protect only train crews engaged in moving trains carrying interstate freight.

As we all know, this Act was held unconstitutional for the reason that it applied to persons employed by the master in *intra*state commerce, as well as persons employed in *inter*state commerce. In short, to persons at times when they could not possibly have any connection with the interstate business of the carrier.

Congress immediately thereafter passed the Act of 1908. Does it say that only train crews injured while engaged in moving trains carrying interstate freight may recover damages of the carrier? Not at all.

It says that "every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury while he is EMPLOYED by *such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative * * *."

The Court below evidently accepted the view urged by defendants. True, it held that decedent at the time of his death was not "employed in interstate commerce. Indeed, * * * not employed in commerce of any kind." But what meaning the Court gave to the word "employed" is not clear. Certainly not the one given by the authorities, philological or juridical.

And, as heretofore pointed out, it is necessary only that the *master* be *engaged* in interstate commerce, by

railroad, and that the *servant* be *employed,* i. e., *used,* by the master in such commerce. In order to carry on interstate commerce by railroad a carrier must have shops where its engines and cars are housed and repaired; it must have men to keep its tracks and roadbed safe; it must have men to provide water and fuel at dif ferent points for its engines; it must have train dispatchers to direct the movements of its trains, and telegraphers to receive and transmit their orders; it must have yard-masters and switching crews; it must have warehouses within which to store the commodities which it hauls, and men to guard, and load and unload the same; it must have baggage clerks, and car inspectors and freight and passenger agents, and machinists and truckers, and mechanics, and flagmen, and call-boys, and watchmen, and station masters and division superintendents, as well as train crews to move its trains. They are all equipollent. One is just as necessary as the other. And if the different members, or different departments, of an interstate carrier should rebel, one against the other, as the several members of the Body once rebelled against the Belly, Interstate Commerce, likewise, would soon languish.

To illustrate: Suppose the switching crews should go on a strike? Within forty-eight hours the freight yards would be congested with a vast congeries of cars

containing merchandise destined to all points of the globe. Interstate commerce would come to a dead stop. Suppose that the section-hands and track-walkers should refuse to work, and that other men could not be secured to take their place? It would not be long before a carrier would not dare to send out a single train, for fear of disaster. Suppose the telegraphers should strike? Could interstate commerce be carried on? Suppose the truckmen in freight depots, or machinists in the car-shops, should refuse any longer to work? Would Interstate Commerce continue to be *interstate,* or even *commerce,* for very long? Innocuous desuetude were "the strenuous life" compared with the stagnation which would result. Prometheus would be bound! Or, rather, *Gulliver*—and by pigmies!

Interstate commerce is a vast plexus of interweaving activities. It is the summation of the manifold and multiform acts of myriads of men. It is an organism, just as the Body is an organism, just as Society is an organism. It, too, is dynamic, not static. It, also, has had its evolution. Like Man, Interstate Commerce has developed from a simple organism into a marvelously complex one. Like Society, it is now a work of co-operation. Division of Labor has been made necessary. Differentiation has been at work. The power of Congress over Interstate Commerce has at all times been unlimited. (In re Debs, 158 U. S. 564, 590; Sherlock v.

Alling, 93 U. S. 99; Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23); Baltimore & O. R. Co. v. Baugh, 149 U. S. 368; Adair v. United States, 208 U. S. 161, 178; U. S. v. Freight Asso., 166 U. S. 290; Gloucester F. Co. v. Penna., 114 U. S. 203; Baltimore & O. R. Co. v. Interstate Commerce Com., 221 U. S. 612.) Congress knowing all this, and desiring, as stated by the Court below, "to exert its authority over the subject matter * * * to the fullest extent" (R. p. 18), decreed,

"That every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to *any* person suffering injury while he is *employed* by such carrier in such commerce * * *."

Could more apt words be employed? We call the especial attention of the Court to the fact that "Employed" as used in the Act is in the *passive* voice. This renders the construction contended for by us ineluctable.

It is a well known rule that any construction which would operate unjustly or lead to absurd results, must be rejected. And would it not operate unjustly to protect only a small number of the persons employed by a common carrier in interstate commerce, (train crews engaged in moving trains), and leave unprotected the vast army of men whose efforts are just as necessary to the carrying on of interstate business as are the activities of train crews? Why not include them also? *They are held to be fellow servants of train crews when*

maimed, or injured or killed by the negligence of train crews.

Although the two following cases properly belong to another division of the subject, we cannot refrain from calling them to the attention of the Court at this time.

In the case of Mobile, Jackson & K. C. R. R. Co. v. Turnipseed, Admr., 219 U. S. 35, the Mississippi Code, which reads, "*Every* employee of a railroad corporation," was construed, and held to apply to a section foreman, against the contention of plaintiff in error that the statute was not applicable to "an employee not subject to any danger or peril peculiar to the *operation* of railway trains."

The Employers' Liability Act provides that every common carrier by railroad while engaging in interstate commerce "shall be liable in damages to ANY person suffering injury while he is employed by such carrier in such commerce." The terms of the latter Act are just as broad, so far as the persons used by the carrier in its interstate business is concerned, as the Mississippi statute.

See also L. & N. Railroad v. Melton, 218 U. S. 36, where the employee was a carpenter, and where, notwithstanding that prior to the decision of the Supreme Court of the United States, the Supreme Court of the

State of Indiana, upon the theory that in order to save the statute in question from being declared repugnant to the equality clause of the State Constitution and the 14th Amendment, had held that the statute must be restricted to employees engaged in train service, the Supreme Court of the United States held that the statute did not violate the 14th Amendment, *and affirmed the decision.* This, of course, it would not have done, if in its opinion such a construction was obnoxious to the equality clause of the State Constitution. The questions raised under the equality clause of a State Constitution can have no bearing upon a federal statute, especially a statute relating to Interstate Commerce. The power of Congress over Interstate Commerce, the persons and instrumentalities used (or employed) therein, is supreme. With the wisdom or policy of any statute relating to it, the Courts have nothing to do. The only question (and that is no longer a question) is, what power has Congress over the subject matter? There is no limitation expressed in the Constitution, and the Courts have imposed none by construction. Therefore, in view of the two decisions above mentioned, it must follow that the Supreme Court of the United States will give the Employers' Liability Act a construction which shall include "*any* person suffering injury while he is employed by such carrier in such commerce," and that it will not limit the application of the Act solely

to persons engaged in the immediate operation of trains, or subject to the hazards peculiar thereto.

And another thing. To refute the contention that it was the purpose of Congress in passing the Act to protect solely train crews engaged in moving trains carrying interstate commerce, it is sufficient to refer to the following Acts of Congress:

The original Safety Appliance Act was passed in 1893. It might be contended with some degree of plausibility that the purpose of Congress in passing this Act was to protect solely employees engaged in moving trains carrying interstate commerce, although it has received no such construction by the Courts. The Act was Amended in 1896, and again in 1903, and 1910.

In May, 1908, the Locomotive Ash Pan Act (35 U. S. Stat. at L. 476, c. 225) was passed.

In March, 1907, the Hours of Service Act (34 U. S. Stat. at L. 913) was passed.

Most of the legislation above mentioned was passed anterior to the passage of the Employers' Liability Act of 1908.

The Acts above mentioned affect largely the safety of persons engaged in moving trains carrying interstate commerce. But complete justice had not yet been done. There were other employees who needed protection. And in response to the economic needs of the time, Con-

gress passed the Employers' Liability Act. Its purpose, as heretofore stated, was to protect *every* employee of an interstate carrier by railroad when injured while doing things relating to, in aid of, or connected with, the interstate business of the master.

Another reason has just occurred to us. If it was the purpose of Congress to protect solely the persons subject to the hazards peculiar to train operation, why did it not say "or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, track, or roadbed"? For what purpose was the concluding part of Section 1 of said Act made to read "or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, *machinery,* track, roadbed, *works, boats, wharves, or other equipment"?* Indeed, the language used in the Act of 1908 is broader than that used in the Act of 1906. The Act of 1906 did not have the words, "boats, wharves, or other equipment" in it. Were not the terms "appliances", "works", "or other equipment" intended to include the machine-shops, the roundhouses, and the "machinery" used therein, as well as many other places and things? And what about defects or insufficiencies, due to its negligence, in its "boats", or "wharves"?

And why provide that the carrier "shall be liable in damages to *any* person suffering injury * * *"? Why did not the Act read "shall be liable to any member

of a train crew''; or ''any person employed on trains''; or ''any engineer, fireman, brakeman, flagman, conductor, or person or persons employed on trains, or engaged as a member of a train crew in the movement or operation thereof''?

One more reason, why the Act, without doing violence to its plain meaning and express terms, cannot be given the narrow construction contended for by defendants: In Barrett v. City of New York, et al., 189 Fed. 268, it was held that where express companies took packages of merchandise coming from other states at railroad or steamer terminals and transported them by wagon through the streets and avenues of New York to the addresses, such business was a part of interstate commerce, and being such, was within the exclusive jurisdiction of the federal government, and not subject to city ordinances licensing the business of expressmen within the city.

Now, it is a well known fact that many railroads, like the Northern Pacific Railway Co., instead of hauling cars for other express companies, conduct, as a part of their business, an express department. Certainly a driver of an express wagon if injured through the negligence ''of any of the officers, agents, or employees of such carrier, or by reason of any *defect* or *insufficiency,* due to its negligence, in its *cars* * * * *appliances, machinery* * * * *or other equipment*'' (which

would include his express wagon and harness, or a motor-driven carriage, if used)—if such an expressman should be injured while in the performance of his duties, he certainly would be "*employed* by such carrier in such commerce", and he would not be injured in the operation of any train, nor would his employment subject him the hazards peculiar to train service. Many other instances, reasons and rules deduced from other authorities might be urged. We will not, however, detain the Court any longer with this phase of the case.

We will now notice a few cases which have arisen under the Act.

EMPLOYERS' LIABILITY ACT DECISIONS.

In the case of Zikos v. Oregon R. & Navigation Co., 179 Fed. 893, plaintiff was injured while repairing the main line of defendant's railroad. On pages 897, 898, Whitson, J., says:

"Giving full scope to the power of Congress over interstate commerce, and admitting sufficient breadth of the Act to include the right to regulate the relations of employer and employee while each is engaged in such commerce, still it is contended that it appears from the complaint that the plaintiff was not so engaged; that repairing the track wholly within the state is in no sense within that term. But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where

the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. Having reference to that phase of the subject, the Supreme Court has said:

" 'That assumption is this: That commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23), and which has not since been open to question.' Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 Sup. Ct. 155, 161, 54 L. Ed.—

" 'The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and

encouraged.' Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

" 'Commerce is a term of the largest import * * * the power to regulate it embraces all the instruments by which said commerce may be conducted.' Weldon v. State of Missouri, 91 U. S. 275, 280, 23 L. Ed. 347. * * *

"But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

In the case of Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832, plaintiff, a railroad trackman, was assisting other employees in the repair of a switch in a railroad yard at night, when he was struck and injured by certain cars negligently kicked along the track with-

out light or warning. The Court held that he was within the protection of the Act. On pp. 836, 837-8, Hand, J., says:

"The remaining question is of the application of the Act of 1908, and that turns on whether the plaintiff was employed in interstate commerce. The Act in question was passed after the decision of the Supreme Court in the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 287, in which a similar act was declared unconstitutional by a divided court, because it applied generally to all carriers engaged in interstate commerce, regardless of whether or not the particular act was in interstate commerce. Some questions, however, were decided by the whole court in those cases, and one of these was that the act was not unconstitutional because it regulated the relation of master and servant; all the justices recognizing that Congress might regulate those relations while the master and servant were employed in interstate commerce. The present act was clearly passed to meet the objection of that decision, and *I think it should therefore be construed as intending to include within the term 'person employed in such commerce' all those persons who could be so included within the constitutional power of Congress; that is to say, the act meant to include everybody whom Congress could include.* Under this construction the inquiry becomes whether Congress could constitutionally have passed a statute regulating the relation between a carrier-master and a servant who engaged in the repair of a track used both for interstate and intrastate commerce. Preliminarily the distinction should be noted that the act will not necessarily apply to the same person in all details of his employment. One man might have duties including both interstate and intrastate commerce, and he

would be subject to the act while engaged in one and not the other. This being so, the question is whether his repairing of a switch is such employment, when the switch is used indifferently in both kinds of commerce. *Suppose the track had crossed a corner of a state, and there was only one station within that state so that all trains crossing over that track must necessarily be engaged in interstate commerce. Would not a track worker engaged in the repair of such a track be engaged in interstate commerce? I do not think that he would be any the less so engaged than the engineer on the locomotive or the train despatcher who kept the trains at motive or the train dispatcher who kept the trains at proper intervals for safety. Of course, it is not necessary that the man must personally cross a state line. If the repair of such a track be interstate commerce, does it cease to be such because there are two stations within the state and some of the trains start at one and stop at the other?* I cannot think that this is true, although counsel have referred me to no case upon the subject and I have found none. The track is none the less *used* for interstate commerce, because it is also *used* for intrastate commerce, *and the person who repairs it is, I think, employed in each kind of commerce at the same time.*

"Despite the earlier ruling in Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, it has in recent times been stated several times by the Supreme Court that state statutes may indirectly regulate interstate commerce, even though Congress may at any time itself under its proper constitutional power enact a provision of directly opposite tenor. Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108. If, as was held in those cases, a state has the power to regulate such commerce until Congress intervenes, because it is as well within the state's proper

powers, must not the corollary be true as well, that Congress may intervene, even when the effect of that intervention be incidentally the regulation of intrastate commerce as well? Could not Congress, for example, provide that all tracks used in interstate commerce must be of a standard width and weight? Would that not affect all tracks used in such commerce, although they likewise were used for intrastate commerce? Of course, any one could use any other tracks he choose for intrastate commerce; but it can surely not be a ground to limit Congress' proper powers that the track has a joint use. If so, the repair of such tracks must be a part of interstate commerce, and under the Employer's Liability Cases, supra, the relations of master and servant arising between the railroad and its employees engaged in repairing the track are similarly within the power of Congress.

"I am therefore of opinion that the plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employees. In short, if the employee was engaged in such commerce, so was the road, for the road was the master, and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."

In the case of Johnson v. Great Northern Ry. Co., 178 Fed. 643 (102 C. C. A. 89), plaintiff was a car repairer, upon tracks in defendant's railroad yards in

the City of Minneapolis. On the date of the injury plaintiff was assigned to do the work of one Burns, whose duty it was to couple up the air hose and make such light repairs as could be done upon the switching track. While between two cars plaintiff was injured by reason of their being moved without warning. On page 648 the Court say:

"Again, we think the facts bring the case within the provisions of Act of Congress April 22nd, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1909, p. 1172), known as the 'Employers' Liability Act', as the defendant, in moving the car in question, was engaged in interstate commerce, plaintiff was employed by such carrier, in said commerce, and the proximate cause of the injury was the defective condition of the coupling pin. * * *

"It is argued that the Employers' Liability Act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of Chicago Junction R. Co. v. King, supra."

Mr. Doherty, in his admirable work entitled "Liability of Railroads to Interstate Employees", discusses the application of the Act.

He says:

"The crew of an interstate train is of course included. A switchman engaged in duty, as such, for an interstate train, a freight handler while employed in handling interstate or foreign freight, and mechanics or car repair men, while engaged in work upon interstate cars or other interstate instrumentalities, *and while passing over the road for the purpose of making repairs upon cars or engines of an interstate train are also included,* and emergency or wrecking crews while at work upon *any* train on an interstate highway may reasonably be included.

"IN OTHER WORDS, ALL WHO ARE AT THE TIME OF INJURY ENGAGED IN DUTY WHICH HAS DIRECT RELATION TO THE INTERSTATE BUSINESS OF THE CARRIER ARE ENTITLED TO THE PROTECTION OF THE ACT.

"*The act may fairly be interpreted to include all mechanics who are engaged at the time of injury upon instrumentalities which are generally and indiscriminately used for all the purposes of an interstate railroad, as, for instance, linemen, track repairers and laborers engaged in the general maintenance of the interstate highway, of its signal wires or apparatus, and those whose duties relate to the construction, maintenance, and repair of those instrumentalities which are used in the business conducted by the interstate railroad without discrimination between the local or interstate character of its traffic.* Snead v. Central of Georgia Ry. Co., 151 Fed. Rep. 608.

"These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril or accident, for, as railroads are practically conducted, there are few employees whose duty

is so purely local that they have no relation to interstate traffic.

"This interpretation of the act is sustained in the case of Johnson v. Great Northern Ry. Co., 178 Fed. Rep. 643, in the Circuit Court of Appeals for the Eighth Circuit."

On page 87 it is said:

"Terminal charges have been held to be within the regulative power of Congress, therefore it may fairly be concluded that yardmen at terminals where local and interstate traffic cars are commingled and generally handled without discrimination, are engaged in interstate commerce and are within the scope of the act.

"This has been expressly decided in Johnson v. Great Northern Ry. Co., 178 Fed. Rep. 643, citing Chicago Junction Ry. Co. v. King, 169 Fed. Rep. 372."

In this connection it may be noted that in the Hours of Service Act (34 U. S. Stat. at L. 1416, c. 2939), Congress has prohibited any operator, train dispatcher, or other employee who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements from being required or permitted to remain on duty for periods longer than those prescribed therein. And, of course, they also are within the protection of the Employers' Liability Act, notwithstanding the fact that they perform work which relates both to interstate and intrastate commerce.

In Missouri the injured servant must be engaged "*in the work of operating such railroad.*" In Callahan v. St. Louis Mer. B. T. R. Co., 170 Mo. 473, 60 L. R. A. 249, 71 S. W. 208, affirmed in 194 U. S. 628, 48 L. Ed. 1157, it was held that where certain workmen were on a trestle which crossed a street in St Louis and were throwing timbers down into the street, *an employee of the company, whose duty it was to warn pedestrians,* was entitled to recover for an injury received through the negligence of the workmen on the trestle, it being held that he was engaged in *operation* of the road.

Also a brakeman, in the discharge of his duties lighting lamps on a caboose, which was being switched so as to attach it to his train, when he was injured in a collision, was engaged in operating the railroad, St. Louis, etc. R. Co. v. Smith, 90 S. W. 926; also a section hand, whose duty it is to assist in repairing a track on a railroad, is engaged in operating a railroad, Thompson v. Chappell, 91 Mo. App. 297, and is within the protection of the statute while riding on a handcar and injured by the negligence of a fellow servant. Overton v. Chicago, etc. R. Co., 111 Mo. App. 613, 86 S. W. 503; Rice v. Wabash R. Co., 92 Mo. App. 35; see also Stubbs v. Omaha, etc. R. Co., 85 Mo. App. 192.

In Pittsburg, etc. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, plaintiff was a passenger train *engi-*

neer and was standing between two railroad tracks where he had gone to take charge of his engine, when he was knocked down by another train of the company. It was held that the Indiana statute applied.

So, in Indianapolis U. Ry. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, it was held that the statute applied to a *telegraph operator* stationed at a track junction, and *whose duties required him to cross the railroad tracks,* and who, while so doing, was struck by a train.

See also:

Missouri Ry. v. Mackey, 127 U. S. 206, 32 L. Ed. 107, affirming 33 Kan. 298, 6 Pac. 291.

Minnesota Iron Co. v. Kline, 199 U. S. 593, 50 L. Ed. 332, affirming 93 Minn. 63, 100 N. W. 681.

Pittsburg R. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845.

Chicago, R. I. & P. R. R. v. Stahley, 62 Fed. 363 (opinion by Brewer, J.).

Haden v. Sioux City, etc. R., 92 Ia. 226, 60 N. W. 537.

Atchison, etc. R. Co. v. Vincent, 56 Kans. 344, 43 Pac. 251.

Rayburn v. Central Ia. R. Co., 74 Ia. 637, 35 N. W. 606, 38 N. W. 520.

Leier v. Minnesota Belt Line R., etc. Co., 63 Minn. 203, 65 N. W. 269.

Bain v. Northern Pacific R. Co., 120 Wis. 412, 98 N. W. 241.

The above decisions were in states where the wording of the statutes was, or the construction of the Courts had been, that only those employees who were subject to the hazards peculiar to the *operation* of railroads, might recover if injured through the negligence of fellow servants.

In other states the statutes have been given a more liberal construction and are held to apply to *all* employees.

Georgia R. Co. v. Miller, 90 Ga. 571, 16 S. E. 939.

Georgia R. Co. v. Brown, 86 Ga. 320, 12 S. E. 812.

Georgia R. Co. v. Ivery, 73 Ga. 499.

Mabry v. North Carolina R. Co., 52 S. E. 124.

Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

Mott v. Southern R. Co., 131 N. C. 234, 42 S. E. 601.

So, the Federal Statute, applying to *any* person employed by interstate carriers by railroad in such commerce, includes all employees, whether operating trains or not.

"EMPLOYED," AS DEFINED BY THE COURTS.

To return to the meaning of the word "Employed". Defendants must accept the definition urged by us, or a much broader one. We call the attention of the Court to the fact that some of the cases hereinafter referred to arose under penal statutes, where the strictest construction would be given to the language used.

In United States v. The Anjer Head, 46 Fed. 664, it is said that "Employed" as used in Act June 29, 1888, c. 496, Sec. 4, 25 Stat. 210 (U. S. Comp. Stat. 1901), p. 3536), providing that any boat or vessel used or employed in violating any provisions of the Act should be liable, etc.; means to MAKE USE OF; TO PUT TO A PURPOSE: that practically the words "used or employed" are synonymous.

So, likewise do we contend that decedent was *made use of* by the carrier, and, as pleaded in the complaint, that the use related exclusively to interstate business. That he was *"put to a purpose"*, and that purpose was the movement of an interstate train.

In King v. United States, 32 Court of Claims, 234, it is said that the word "employed", in Act May 24, 1888, c. 308, 25 Stat. 157 (U. S. Comp. Stat. 1901, p. 2637), declaring that eight hours shall constitute a day's work for letter carriers, and that if a carrier is *employed* a greater number of hours per day than eight, he shall

be paid extra, "means actual employment in the carrier's work or service, and does not extend to intervals, however brief, when the carrier has control of his time."

It will be remembered that the complaint alleges that decedent's "duties as such fireman required him to respond at any time of the day or night when he should be called upon by said company to perform any of his duties assigned him from time to time." (Paragraph VII. of Amended Complaint, R. p. 5.)

That in paragraph IX. it is alleged, "That on said first day of December, 1910, at about 7:15 p. m. of said day, in said town of Tekoa, Washington, said defendant ordered said Lamphere to proceed from his home to said passenger station and there secure proper transportation and go aboard Train No. 3, which train was due at 7:45 p. m. of said day, and was an INTERSTATE train and proceed upon said train to Spokane, Washington, and relieve the fireman on Engine No. 522, WHICH ENGINE WAS PULLING A TRAIN OF CARS ENGAGED AT THE TIME IN INTERSTATE COMMERCE BY RAILROAD."

That in paragraph X. it is alleged "That immediately after receiving said order mentioned in the preceding paragraph herein, said Lamphere immediately left his home and proceeded toward said railway station, for the purpose of obeying said orders and getting upon

said train to relieve the said fireman as aforesaid, and for that purpose he proceeded along and upon said foot-path upon and across the yard of said company, in the performance of his said duties, and for the purpose of, and as one of the necessary acts in performing his duty as a fireman for said company in its service in carrying on its business of an interstate common carrier by railroad."

Was not decedent actually employed in the carrier's work or service? Did not the duties being performed by him relate exclusively to interstate commerce? Did Lamphere after receiving the orders of the company have any control of *his time?—or actions?* Certainly not.

And in United States v. Catherine, 25 Fed. Cases 332, 338, it is said that "To be employed in anything means not only the act of doing it, *but also to be engaged to do it; to be under contract or orders to do it.*" And it was held that "employed", as used in the Act of Congress prohibiting any citizen of the United States to have any property in a vessel *employed* in transporting slaves, means not only the act of doing it, *but also to be engaged to do it, and that the chartering and fitting out of a vessel at Havana with design to have her perform a voyage then arranged for bringing slaves to the country brought the transaction within the prohibition of the Act.*

And so, in United States v. Morris, 39 U. S. (14 Pet.) 464, 475, 10 L. Ed. 543, Chief Justice Taney, speaking for the Court, said:

"The question in this case is, whether a vessel, on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board. To be 'employed' in anything, means not only the act of doing it, *but also to be engaged to do it; to be under contract or orders to do it.* And this is not only the *ordinary* meaning of the word, but it has frequently been used in that sense in other Acts of Congress. (Citing instances.) * * * Again the Act of July 2nd, 1813, Sec. 8 (3 U. S. Stat. 4), declares that certain vessels 'employed' in the fisheries, shall not be entitled to the bounties therein granted, unless the master makes an agreement, in writing or in print, with every fisherman employed therein, before he proceeds on any fishing voyage. Here, the vessel is spoken of as 'employed' in the fisheries, before she sails on the voyage. * * *

"*In like manner, the vessel in question was employed in the transportation of slaves, within the meaning of the Act of Congress of May 10th, 1800, if she was sailing on her outward voyage to the African coast, in order to take them on board, to be transported to another foreign country. In other words, she is employed in the slave-trade.*"

Can there be any doubt that Lamphere was *employed* by defendant in interstate commerce? Just as fitting out a vessel in order to carry slaves, just as

embarking on the outward voyage to receive a cargo of slaves, were preliminary and essential steps to the act of transporting them, so were the things done by decedent under the direction of the company, a part of, were connected with, were incidental to, were made necessary by, the interstate business of defendant. Decedent was not only under contract or orders to bring this interstate train forward, *but was at the time actually engaged in doing those things which were necessary to be done, and which if not done, the train could never be moved.*

And this brings us to other important and conclusive arguments in favor of plaintiff's contention.

SAFETY APPLIANCE DECISIONS.

We have seen that the word "employed" as used (or employed) in the Employers' Liability Act is synonymous with "used". In Section 2 of the Safety Appliance Act of 1893 (27 Stat. at L. 531, c. 196) common carriers are forbidden to "haul, or permit to be hauled *or used*" any car not equipped as in said Act provided.

In Section 4 of the Act they are forbidden "to *use* any car" not equipped as provided in said Act.

In Section 6 (Amendment April 1, 1896, 29 Stat. at L. 85) of the Act a penalty is imposed when any car is "hauled or *used*" in violation thereof.

The Amendment of 1903 (32 Stat. at L. 943, c. 976), applies "to all trains, locomotives, tenders, cars, and similar vehicles USED, etc."

In the case of Johnson v. Southern Pacific, 196 U. S. 1, 49 L. Ed. 363, plaintiff, a brakeman, had been injured while attempting to couple an engine to a dining car, *which was standing on a sidetrack*, for the purpose of turning the car around preparatory to its being picked up and put on the next west-bound passenger train. The Supreme Court, reversing both the Circuit Court of Appeals of the Eighth Circuit and the Circuit Court for the District of Utah, say:

"Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475, is cited as supporting that contention. In Coe v. Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

"The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

"*Confessedly this dining car was under the control*

of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

This in answer to the contention of counsel for the defendant that the mere intention to use an insolated car standing in a railroad yard for that purpose was insufficient to give it an interstate character.

Since the power of Congress to regulate commerce among the States is plenary, (Lottery Cases, 188 U. S. 321, 356), and the Constitution "authorizes legislation with respect to all the subjects of foreign and interstate commerce, *the persons engaged in it*" as well as "the instruments by which it is carried on" (Sherlock v. Alling, 93 U. S. 99), and the power over the instrumentalities is no greater than it is over the persons engaged therein, and the language employed (or used) in the different Acts are synonymous, and the facts in the case at bar are similar (Lamphere's duties requiring him to respond at any hour of the day or night to haul interstate trains, and at the time was doing what he had been ordered to do, and what he was doing relating exclusively to interstate business of the defendants), the Johnson case fairly bristles with analogies favorable to plaintiff.

The Court in that case also held that the decision of the Circuit Court of Appeals that the car was empty,

and for that reason was not being *used* in interstate commerce, was erroneous. It cited with approval Voelker v. Chicago, M. & St. P. R. Co., 116 Fed. 867, to that effect.

In Erie v. Russell, 183 Fed. 722, it was decided that a car was in *use* while standing on a side track; see also, Schlemmer v. Buffalo, R. & P. Ry. Co., 205 U. S. 1; United States v. St. Louis Southwestern Ry. Co. of Texas, 184 Fed. 28; St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281; United States v. Northern Pacific Terminal Co. of Oregon, 144 Fed. 861, opinion by Wolverton, J., and the case of Southern Ry. Co. v. United States, decided October 30, 1911, Co-ops. Advance Sheet of Dec. 1, 1911, p. 2.

We desire now to notice another very important phase of the case.

FELLOW-SERVANT DECISIONS.

It is desirable first to distinguish the position taken by us in the Court below from the conclusions arrived at by the learned judge, who has unconsciously confused the two. In the course of his opinion, he says:

"*It was conceded on the argument, by counsel for both parties, that the deceased was killed through the negligence of his fellow-servants, and that the complaint states no ground of recovery at common law.* In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations

of the complaint clearly show that the deceased and the servants whose negligence caused his death were fellow-servants of a common master at the time of the injury, within the rule which has long prevailed in the federal courts.'' (R. p. 13.)

The position taken by us may be best explained by quoting from our trial brief, copies of which were handed to the Court and to counsel for defendants. This brief was in reply to defendants' trial brief, which had been served on us. On pages 6 and 7 appear the following words:

''Decedent was either engaged in interstate commerce or nothing. If in interstate commerce, the defense of injury by negligence of fellow-servant is of no avail. If not in interstate commerce, i. e., not in the service of defendant, he stands upon the same footing with (as) the public in general. The complaint states a cause of action in either event, and the demurrer should be overruled.'' This was said in summing up our case.

On page 1 of our trial brief the following language was used:

''On page 3 of defendants' brief the following remarkable statement is made:

'' 'In answer to the question as to what the employee was engaged in, if not in interstate commerce, we say, not anything.'

''This, too, despite the fact that on pages 1 and 2 of said brief, defendant states that plaintiff may not recover because decedent was killed through the negligence of a fellow-servant! If decedent was not engaged

in *anything*, he could have been performing no duty that he owed to defendant. He was, therefore, on an equal footing with other members of the general public. And under the statutes of the State of Washington his personal representative may maintain an action against a person or corporation negligently causing his death."

In other words, our contention was that defendants could not eat their cake and have it. That they must take one position or the other, and accept with the one taken all the consequences flowing therefrom. If benefits, also obligations. That they could not avail themselves of the advantages of both positions, and incur the responsibilities of neither.

From what has been said we think the antinomies of the Court's decision have been made apparent.

In the case of Fletcher v. Baltimore and Potomac R. R. Co., 168 U. S. 135, 138, the Court say:

"*The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not bring it within the rule.* A railroad company is bound to use ordinary care and caution to avoid persons or property which may be near its track. This is elementary."

In Orman v. Salvo, 117 Fed. 233, 54 C. C. A. 265, it is said:

"The argument principally relied on by defendants' counsel—namely, that if the plaintiff was not warned of the coming danger, the failure to give such warning was the negligence of a fellow-servant—cannot be maintained upon the pleadings and evidence in this case. *To permit the application of the fellow-servant doctrine, the injured servant must at the time of the injury not only be serving the same master, but be engaged in the same employment with the negligent servant who caused the injury.* Wood, Mast. & Serv., Sec. 435. The answer admits that defendants furnished the tent for boarding their employees, and for their lodging, and that it was the custom and rule of defendants to have one of their employees warn every one in the vicinity of blast of the fact that it was about to be discharged, and that plaintiff was at the time of this blast in the tent resting beween intervals of labor. * * * *Plaintiff occupied the tent, not as a boarder or tenant, but as a servant of the defendants, and his board and lodging was received in part compensation for his services.* Wood, Mast. & Serv., Sec. 155. But while engaged at his meals or wrapped in slumber *he was performing no services for the master, and being in the performance of no employment,* but obtaining and enjoying compensation from the master, *he was not during such time the fellow-servant of any of the employees who were at work, about which he was in no way engaged or assisting.* He was not in the condition of a servant who is being conveyed in a car to his work, but was as much separated from it as if he had been sleeping in his home a mile away."

In Sullivan v. New York, N. H. & H. R. Co. (Conn.), 47 Atl. 131, it was held that where deceased was a section foreman of defendant railroad company, but was injured after working hours while on a crossing, the

company's duty towards him was the same as a stranger, and hence it could not avail itself of the rule that an employer is not liable for an injury to an employee through the misconduct of a fellow-servant.

So, in Washburn v. Nashville & C. R. Co., 40 Tenn. 485, 488, 3 Head. 639, 643, it is said:

"But the instructions are erroneous in another respect. The principle stated above (fellow-servant rule), does not apply '*Where the servant was not, at the time of the injury, acting in the service of the master.* In such case, the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant'. 6 Eng. Cases, 580, cited in 1 Am. Law. Rep. Cases, 568, in note."

In the case of Tingley v. Long Island R. Co., 96 N. Y. Sup. 865, it was held that,

"The employment of a physician by a railroad, under a contract by which the physician agrees to *attend employees and passengers of the railroad* when called upon to do so, *does not* make the physician a fellow-servant with railroad operatives by whose negligence the physician is killed while crossing the railroad's tracks on his way to the station to take a train to attend *one of his own* patients."

See also, Baltimore & O. R. Co. v. State, 33 Md. 542, where a track-walker going home after work upon the tracks of defendant was not at that time an employee; also Columbus & T. R. Co. v. O'Brien, 4 Ohio C. C. 515, to same effect. Also, Louisville, etc. R. v. Wade (Fla.), 35 So. 863, and The Titan, 23 Fed. 413, 23 Blatchf. 177.

The case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, is not in point. The case was affirmed in 133 Fed. 471, 66 C. C. A. 345, *on the ground of contributory negligence,* but the Court intimated that in view of the case of Ellsworth v. Metheny, 104 Fed. 119, 44 C. C. A. 484, the holding of the lower Court that decedent was still in the course of his employment (and therefore, a fellow-servant of those who killed him) was erroneous.

The determinant factor is always, whether at the time of injury the servant is performing services for the master. This determines whether he was or was not a fellow servant of the persons injuring him. *On principle, there is no difference between an employee being killed on a public highway* while going from his work to his home (as in the Fletcher case, 168 U. S. 135), *and an employee being killed on a public highway while going from his home to his work.* And the Court will remember that it is alleged in the complaint:

"That on, to-wit: the 1st day of December, 1910, said *company provided and maintained across its numerous tracks near the north end of its passenger station, a certain footpath, extending from a footbridge situated on the west side of said yard, across said tracks past the north end of its passenger station connecting with one of the principal thoroughfares in the said city on the east side of said yard, which footpath was on said day, and had been for a number of years prior thereto, used continuously* by some of the employees of said com-

pany, including said C. Roy Lamphere, in the performance of their duties, *and other pedestrians, commonly, generally and notoriously, in walking from a west side portion of said town to said passenger station and other parts of said town.*" (Paragraph VI. of Complaint, R. p. 4.)

In Paragraph VIII. of the Complaint (R., p. 5), it is alleged:

"That said footpath crossing said tracks and yard, as aforesaid, was so commonly and frequently used, as aforesaid, that said company and its employees operating, using and switching cars and making up trains in said yard, would so arrange said trains and cars, that an opening would always be left between the ends of the cars so as to provide a passage-way between said cars, upon said footpath, so as to enable said footpath to be used as aforesaid, and it was also the custom and practice of said company that before any of said cars on either side of said footpath would be coupled together or jammed together for any purpose, a brakeman, switchman or other employee would be placed upon said footpath crossing so as to warn pedestrians and other employees of said company and prevent injuries by the coming of said cars."

It requires no citation of authority that defendants would be liable to a stranger if killed on this crossing in the manner decedent was killed. The company recognized the right of the general public by cutting the cars at this point.

Now, as stated in Orman v. Salvo, 117 Fed 233, "*to permit the application of the fellow-servant doctrine,*

the injured servant must at the time of the injury not only be serving the master, but be engaged in the same employment with the negligent servant who caused the injury.''

As alleged in Paragraph XI. of the Complaint (R., pp. 6 and 7), the employees who killed plaintiff were *working for the defendants* (also, engaged in interstate commerce), and if decedent could not be *''serving the master''* or *''engaged in the same employment with the negligent servant who caused the injury''* until he should board his engine, then the fellow-servant doctrine does not apply. In that event, the complaint states a cause of action under the statutes of the State of Washington.

We think that, at least, the question of whether or not decedent was employed in interstate commerce, notwithstanding the facts were undisputed, should have been left for a jury. At any rate, the question of whether the relation of master and servant existed at the time should have been. The lower Court, in denying Lamphere the protection of the Employers' Liability Act, said that his *employment* was ''only constructive at best'' (R., p. 20). If *only constructive* (and therefore not sufficient to justify the application of the humane Employers' Liability Act), it should also continue to be *only constructive,* and therefore insufficient to justify the application of the cruel fellow-

servant doctrine. It should not be a mere rope of sand in the one instance, and a sempiternal chain in the other. In the language of the Supreme Court of the United States, "the defense at best was a narrow one, and, in our view, more technical than just."

In view of the fact that the accident occurred on the company's grounds, and at a place which was used not only by its employees in the performance of their duties, but by the general public as well, and the further fact that decedent was subject to call at any time and had been commanded by the master to do the things which he was engaged in doing when he met his death, the case of Packet Company v. McCue, 17 Wall. 508, applies. This case is referred to by the Court in Philadelphia, B. & W. R. Co. vs. Tucker, 35 App. D. C. 123, as follows:

"In Packet Company v. McCue, 17 Wall 508, a bystander was hired on a wharf to assist in loading a boat which was soon to sail. This man had been occasionally employed in such work. His services occupied about two and one-half hours, *when he was directed to go to 'the office,'* which was on the boat, and get his pay. This he did and then attempted to go ashore. While on the gang-plank the plank was recklessly pulled from under his feet and he was thrown against the dock, receiving injuries from which he died. *Owing to the somewhat peculiar nature of the case it was held that it was for the jury to say, although the facts were undisputed, whether the relationship of master and servant existed until the man got completely ashore.* The

concluding sentence of the opinion of Mr. Justice Davis was as follows: *'The defense at best was a narrow one, and, in our view, more technical than just.'* ''

If, on the other hand, it be a fact that decedent at the time was a fellow-servant of the persons who killed him—that is, *serving the master*—it must necessarily follow that he was employed by the master in interstate commerce.

FURTHER OF FELLOW SERVANT DECISIONS.

In the case of Boldt v. New York Central Railroad Company, 18 N. Y. 432, ''plaintiff was employed to labor in graveling and ballasting a new track, which was on the same road-bed with and about six feet distant from the old track, and was injured by a train of cars of the defendants running on the new track, on which no trains of cars had before been run.''

At the time of the injury plaintiff was going from his home to his place of work. The Court held that he was injured through the negligence of fellow servants, and could not recover.

On page 434, Chief Justice Johnson, speaking for the Court, says:

''When the plaintiff was injured he was walking on the new track from his house to his work. *But he was in the defendants' employment and doing that which was essential to enabling him to discharge his particu*

lar duty, viz.: going to the spot where it was to be performed, and he was moreover going on the track where, except as the servant of the company he had no right to be. He was there as the employee of the company, and because he was such employee."

So in the case at bar, Lamphere was doing that which was essential to enabling *him* to discharge his particular duty, viz., *going to the spot where it was to be performed.* And what duty was it he was to perform? *To move an interstate train.* And what kind of train was he to board? *An interstate train?* And by what kind of train was he killed? *An interstate train.* Is there a single word in the complaint about *intra-state* commerce trains or business? No. He was, therefore, in the service of the master. He was in the employment of the defendant company. He was employed by defendant in interstate commerce.

But, says the Court below, Lamphere was killed through the negligence of fellow servants. How, we ask, *can a person be a fellow servant of the persons injuring him, unless he himself at the time of injury is performing a fellow service?*—something contemplated by his contract of employment? And if he was doing something contemplated by his contract of employment, he was *employed,* i. e., USED, by the defendant in carrying on its business of interstate commerce.

If decedent at the time of his death had been going

down-town after dinner to engage in a game of pool or billiards, or had been on his way to a theatre, the mere fact that he was in the *general employ* of the defendant would not have made him a fellow-servant of the persons who killed him. Why? *Because he would not have been doing anything contemplated by his contract of service. Because he would not have been doing anything which related to the business of the master.* He would have stood upon the same plane as any other member of the general public.

But here we have the anomalous condition of a Court's declaring that decedent was a fellow-servant, and not a fellow servant; that decedent, when killed, was in the line of his duty, and not in the line of his duty; that he was working for the company, and not working for the company; that he was being used in interstate commerce, and not being used in interstate commerce; that he was engaged in doing something, and not engaged in doing anything!

By holding that decedent was a fellow servant of those who killed him (*and the persons who killed him were engaged in interstate commerce*), plaintiff cannot prosecute an action under the state statutes giving a right of action for the negligent killing of one person by another. (See appendix.)

And then, despite the holding that when killed decedent was in the employ of the master, *and was doing*

things contemplated by his contract of employment—nay, which he had been commanded to do by the master—despite the fact that the master was an interstate carrier, and that the *duties of Lamphere, as pleaded in the complaint, related exclusively to interstate business of the master; that the train to be moved was an interstate train;* that it was on the main line of an interstate road over which there does not move a single train that is not engaged in interstate commerce—despite all these things, the Court then denies plaintiff the protection of the Employers' Liability Act, which eliminates the defense of negligence of fellow-servants.

The case at bar is much stronger than the Bolt case (18 N. Y. 432). On page 432 it is stated that Bolt "was walking, *early in the morning,* from his residence along the new track where he was to work, when he was overtaken and struck down.

He was merely reporting for the performance of his customary duties. So far as is shown by the opinion, he had ample time. There was no emergency. The master had not directly commanded him to report—had given him no orders whatsoever. He was not subject to call at any hour of the day or night. All that was required of him was to be on time at the place of operation. Still the Court held that the relation of master and servant existed at the time.

But decedent's duties as "fireman required him to respond at any time of the day or night." (R., p. 5.)

"At about 7:15 *P. M.*" he was ordered "*to proceed from his home* to said passenger station" and board Train No. 3, "which train was due at 7:45 *P. M.,*" and proceed to another town and relieve the fireman on Engine No. 522, which engine was pulling a train of cars engaged at the time in interstate commerce. The crew to be relieved could work no longer, or the master would be subject to heavy penalties.

Decedent was given only 30 minutes within which to change his clothes and get to the station. *Bolt's time was his own. Decedent's belonged to the company. At the time he was killed he was actively obeying his master's command. And the things which he was doing related wholly to the interstate business of the master. Was he not employed by the master in interstate commerce?* We think so.

Where an employee of a railroad, while returning from his dinner to his work, was injured by being struck by a passing train negligently run by the engineer, the servant was still in the master's service, and a fellow servant with the engineer of the train, at the time of the accident.

Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90.

It having been settled law for decades (in the absence of statutes eliminating the fellow-servant doctrine) that a servant on his way to work *was*, for all

practical purposes, *at work,* it ought not now (in the presence of such statutes) to be held that he is not. Especially, it should not be held that he is *not,* for the purpose of evading an Act abolishing the doctrine, and that he *is,* for the purpose of applying such doctrine.

Even conceding (for the purposes of orgument) that an employee must be *engaged* in interstate commerce, if it has been the law for generations that an employee on his way to work was in the master's service—was *engaged* in the work which he was on his way to perform—and this, too, regardless of whether there was an emergency, or whether he was at the time actively obeying orders or not—should it not now be held that a servant on his way (*in obedience to a command of the master*) to *engage* in interstate commerce, *is engaged* in it?

But, as heretofore pointed out, it is only necessary that the servant be USED by the master in interstate commerce. Decedent was so used, because at the time he was actively and diligently obeying the command of his master, and doing things in aid of, and which related exclusively to, the interstate business of defendant. He was, in short, "employed by such carrier in such commerce."

What effect would the death of a person who was not employed by defendant in interstate commerce have upon such commerce. Absolutely no effect whatsoever.

Therefore, if decedent was not employed by defendant in interstate commerce, if there existed no nexus between decedent and the interstate business of defendant, his death, though no person could be found in the wide world to perform the duties left unperformed by him, would make no difference whatsoever. Interstate commerce would not be affected in any way, not even for an instant. It would go on just the same. But decedent, in obedience to defendant's command, was on his way to bring an interstate train forward. The result which his death must have had, and did have, upon the movement of that interstate train, was to keep it standing until some one could be found to take his place. The time of movement of such train was in direct proportion to the time of finding such a man. If an hour, an hour; if a day, a day. It appears, then, that the movement of interstate commerce *did* bear some relation to decedent. Indeed, it bore so heavily upon him that it crushed him. It stood motionless until another was found to take his place—to finish the work which he left unfinished. *Then, and not until them, it moved!*

The case of Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, was an action brought under the Employers' Liability Act of 1906, which has been held constitutional as applied to the District of Columbia and the Territories. The opinion is interesting, exhaustive and logical. Say the Court:

"When Tucker was killed he was upon the premises of the defendant, in response to its call, to assume the duties he had been engaged by the defendant to assume, and for their mutual interest and advantage. Can it be that, under such circumstances, the relation which the decedent sustained to the defendant was that of a mere stranger? Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurs before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for a moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants."

This case on appeal was affirmed by the Supreme Court of the United States in Philadelphia, B. & W. R. Co. v. Tucker, 220 *U. S.* 608.

In St. Louis, A. & T. R. Co. v. Welch, 72 Texas, 298, 2 L. R. A. 839, 10 S. W. 529, it was held that the foreman of a bridge crew, who was asleep on a side-track in a car provided for that purpose, and *who was liable to be called at any moment to go out with his gang upon the road,* was on duty, so far as to be at the time a fellow servant of the men operating a freight train, by whose negligence he was injured.

See also:

Savannah, F. & W. R. Co. v. Chaney, 102 Ga. 841, 30 S. E. 437.

O'Brien v. Boston & A. R. Co., 138 Mass. 387.

Ewald v. Chicago & N. W. R. Co., 70 Wis. 420, 36 N. W. 12, 591.

Ryan v. Chicago & N. W. R. Co., 60 Ill. 171.

Taylor v. Bush & Sons, 61 Atl. 236, affirmed 66 Atl. 884.

O'Neil v. Pittsburg C. C. & St. L. R. Co., 130 Fed. 204.

Pendergast vs. Union Ry. Co., 41 N. Y. Sup. 927.

As pointed out in Willmarth v. Cordoza, 176 Fed. 1, 99 *C. C. A.* 475, *the test is, whether the relation of*

master and servant exists. And this has always been the determining factor whether the action involved the doctrine of assumed risk, the safe-place rule, or as in Willmarth v. Cordoza, the fellow-servant doctrine. As stated in the note to that case in 27 L. R. A. (N. S.) 376, *the question of fact to be first determined is whether the relation of master and servant actually existed at the time of the injury.* In the case at bar there can be no doubt that the relation existed. *Lamphere was subject to call at any hour of the day or night. And when he met his death he was doing what his master had ordered him to do. And, as alleged in the complaint, the things he was doing related exclusively to, were made necessary by, and in aid of, the interstate business of defendant. It follows, necessarily, that decedent was employed by the defendant in interstate commerce. Either this, or he was a stranger to defendant.*

The recent case of Moyse v. Northern Pacific Ry. Co. (Mont.), 108 Pac. 1062, is an interesting one.

"A freight conductor *who was required to be within call,* and who was expected to occupy the caboose of his train at night while awaiting the call to go on duty * * * was, while so occupying it, in the discharge of his duties, though his pay stopped on his registering on his arrival, and would not begin until he was called to make his return trip * * *."

Decedent was required to respond at any time. He had been called, and had been told what to do. He went about his work—interstate commerce work—and was killed. Can defendants contend that the relation of master and servant did not exist? If it did, decedent was employed by them in interstate commerce. If not, he was a stranger to them. In either case defendants are liable. They make take either position they choose. But only *one*,—and stand or fall by it.

WHICH CAUSE OF ACTION?

In our opinion, instead of not stating facts sufficient to constitute *a* cause of action, the Amended Complaint states enough facts for *two* causes of action. It is all a matter of emphasis—and jurisdiction.

1. Decedent, an employee of defendant, was killed on a *public crossing* by the negligence of defendant's servants, while on his way from his home to his work. His personal representative, therefore, may maintain an action for his death, for the benefit of his widow and child, under the Washington statutes.

> Fletcher v. Baltimore & P. R. R. Co., 168 U. S. 135, 138.
>
> Orman v. Salvo, 117 Fed 233, 54 C. C. A. 265.

2. But he was always on call. At the time he was

obeying the command of the master. The relation of master and servant, therefore, existed. The point at which he was killed was on the premises of the master, and was used by decedent and other employees in the discharge of their duties. The things which he was engaged in doing related exclusively to, were in aid of, and made necessary by, the interstate business of defendant. He was, therefore, employed by defendant in interstate commerce. He was also a fellow servant of the persons who killed him. But the Employers' Liability Act abolishes the defense of negligence of fellow servants. An action may, therefore, be maintained thereunder.

Philadelphia, B. & W. R. Co. v. Tucker, 35 App. D. C. 123, affirmed, 220 U. S. 608.

Fletcher v. Baltimore & P. R. R. Co., 168 U. S. 135, 138.

Orman v. Salvo, 117 Fed 233, 54 C. C. A. 265.

The power of Congress over interstate commerce, the corporations engaged, as well as the instrumentalities and persons used (or employed), therein, is supreme. The Employers' Liability Act, therefore, is exclusive; and any action in the premises must be maintained thereunder.

We ask that the judgment be reversed, and that the Court be instructed to overrule the demurrers of defendants.

Respectfully submitted,

W. H. PLUMMER *and*
HENRY JACKSON DARBY,
Attorneys for Plaintiff in Error.

APPENDIX.

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living * * *; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of such wife and children. * * *.

1 Rem. & Bal. Annotated Code and Statutes of the State of Washington, Sec. 194.

When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages causing the death.

1 Rem. & Bal., etc., Sec. 183.

"While it is customary to prosecute such actions * * * in the names of the widow and children, they may likewise be prosecuted in the name of the personal representative for the benefit of the widow and children. Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333." Rudkin, *J.*, in

Archibald v. Lincoln County, 50 Wash. 55, 58; 96 Pac. 831.

2065

United States Circuit Court of Appeals for the Ninth Circuit

P. L. LAMPHERE, as administrator of the estate of C. ROY LAMPHERE, deceased and as the personal representative of said deceased,

Plaintiff in Error.

vs.

OREGON RAILROAD & NAVIGATION COMPANY, a corporation, and the OREGON-WASHINGTON RAILROAD AND NAVIGATION COMPANY, a corporation,

Defendants in Error.

Brief of Defendants in Error

Upon Writ of Error to the United States Circuit Court for the Eastern District of Washington, Eastern Division.

W. W. COTTON, ARTHUR C. SPENCER, and RALPH E. MOODY,

Attorneys for Defendants in Error.

PACIFIC BANKER

In line fi[illegible] [illegible]ive, the word "o enly" should read "often".

In the fourth line from the bottom of page thirty, the word "interst te" should read "interstate".

In line three of the first paragraph on page thirty-seven, the words "interstate ocmmroe" and the words "interstate ce e roe" in the last line of the paragraph should read "commerce interstate".

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ARGUMENT.

We agree with counsel for plaintiff in error that the employe does not engage in interstate commerce, but, as an employe, it is impossible for him to engage in it.

The Standard Dictionary, published by Funk & Wagnalls Company, defines the word "commerce" as follows:

"The exchange of goods, productions or property of any kind; especially, exchange on a large scale, as between states or nations. Extended trade."

"Interstate commerce: Interstate commerce between people living in different States of the United States, including transportation of property and carriage of passengers across State lines."

In the case of Welton v. Missouri, 91 U. S. 275 (23 Law Ed. 347), the Supreme Court of the United States defines commerce as follows:

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all of its forms; **including the transportation,** purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."

So it will be seen from the above definitions that railroad companies only **engage** in interstate commerce by being **engaged** in the **transportation** of commerce, and it seems clear that this is the meaning which Congress intended to convey when it used the expression "engaging in commerce" in the Employers' Liability Act. However, we will deal with this question further anon.

Fellow Servant.

The court in its opinion said:

"It was conceded on the argument, by counsel

for both parties, that the deceased was killed through the negligence of his fellow servants, and that the complaint states no ground of recovery at common law. In view of this concession it is perhaps unnecessary to consider that phase of the case, but in any event the allegations of the complaint clearly show that the deceased and the servants, whose negligence caused his death were fellow servants of a common master at the time of the injury, within the rule which has long prevailed in the Federal courts.

> Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, and cases cited."

It would seem that the statement of the court of the concession of counsel ought to be conclusive of the question. However, in their brief in answer to defendant's brief, on the demurrer to the plaintiff's amended complaint, counsel for plaintiff in error say:

"It is our contention, however, that decedent, at "the time of his death, was in the line of his duty, "and was killed through the negligence of a fellow "servant."

"In addition to the cases cited by defendant we "refer the court to the following:

"Where an employe of a railroad, while returning "from his dinner to his work, was injured by being "struck by a passing train negligently run by the en- "gineer, the servant was still in the master's ser- "vice, and a fellow servant with the engineer of the "train, at the time of the accident."

"Olson v. Andrews, 168 Mass. 261; 47 N. E. 90.

"Where an employe was injured while he was "walking from his house to his employment, he was "in the service of the master, and was doing that "which was essential to enable him to discharge "his particular duty, viz., going to the spot where his "duty was to be performed."

"Boldt v. N. Y. Ry. Co., 18 N. Y. 432.

"The above case was cited with approval and "followed in

"Mele v. Delaware & G. Canal Co., 27 Jones "& S. 367; 14 N. Y. Supp. 630.

"See also the folowing cases:

"Savannah F. & W. Ry. Co. v. Chancy, 102 "Ga. 814; 30 S. E. 437.

"O'Brien v. Boston & A. Ry. Co., 138 Mass. "387; 52 American Reports, 279.

"Ewald v. Chicago & N. W. Ry. Co., 71 Wis. "420; 5 American State Reports, 178; 36 N. "W 12, 591.

"Ryan v. Chicago & N. W. Ry. Co., 60 Ill. "171; 14 American Reports, 32.

"Adams v. Iron Cliffs Co., 78 Mich. 271; 18 "American State Reports, 441; 44 N. W. "270.

"Cowhill v. Roberts, 71 Hun 127; 24 N. Y. "Supp. 533.

"Affirmed in 144 N. Y. 649; 39 N. E. 493.

"In Dishon v. Cincinnati, B. O. & T. Ry. Co., "126 Fed. 194.

"Affirmed in 66 C. C. A. 345; 133 Fed. 471.

'Plaintiff's intestate was employed by defendant 'as a section hand, and lived, with others, in a section 'house near the track. Defendant's employes had 'been in the habit of cutting trains while standing 'on the tracks opposite the section house to afford 'access to and from the house across the tracks, and 'on the occasion of defendnat's death he and the 'other employes, after working hours, left the house 'to go to defendant's depot for their own purposes, 'and while deceased was passing between certain 'cars standing on a track the opening was closed and 'deceased was caught between the cars and killed 'through the alleged negligence of the train opera- 'tors in failing to give deceased any warning of 'their intention to do so. Held, that notwithstanding 'the injury occurred after working hours, the opera- 'tives in charge of the train were follow servants 'of the deceased, and that he, therefore, assumed 'the risk of injury from their negligence.'

"The court says:"

'It should be held that the servant assumed all 'the risk he runs, excluding that of the master and 'including that of the pure negligence of the co- 'selvants, whenever doing anything contemplated 'by his contract of employment, i. e., which under 'that contract it is his duty, or he has a right to 'do. In other words, it should be held that the as- 'sumption of risk by the servant is as broad and

'sweeping as the scope of action on his part required 'or authorized by the contract.'

In addition to the cases above cited the rule is laid down in 26 Cyc. at page 1289, as follows:

"Going to and from work. In a number of cases servants on their way to and from work have been held, although not actually on duty, to be fellow servants of other employes of the master engaged in the same common employment so as to relieve him of any liability for injuries received by them through the negligence of such other employes. This rule has been most frequently applied in the case of servants riding to and from work on the master's trains or other conveyances; but other cases hold that an employe in such a situation is not a fellow servant of other employes of the master, so as to exonerate him from liability for their negligence. This later view is in most instances based upon the different department limitation of the fellow servant rule, as recognized in a number of jurisdictions."

In support of the text that servants on their way to and from work are fellow servonts of other employes of the master engaged in the same employment, and that the rule has been most frequently applied in the case of servants riding to and from work on the master's trains or other conveyances, there is cited the following cases:

Mele v. Delaware, etc., Canal Co., 14 N. Y. Supp. 630.

Ewald v. Chicago, etc., Ry. Co., 70 Wis. 420; 36 N. W. 12, 491.

Southern Pac. Co. v. McGill, 5 Ariz. 36; 44 Pac. 302.

Bailey v. Garbutt, 112 Ga. 288; 37 S. E. 360.

Ellington v. Beaver Dam Lumber Co., 93 Ga. 53; 9 S. E. 21.

Baltimore, etc., Ry. Co. v. Clapp, 35 Ind. App. 403; 74 N. E. 267.

Ind., etc., Rapid Transit Co. v. Andis, 33 Ind. App. 625; 72 N. E. 145.

Kan. Pac. Ry. Co. v. Salmon, 11 Kan. 83.

McQuirk v. Shattuck, 106 Mass. 45; 35 N. E. 110 (laundress driving to work in master's coach held a fellow servant of the driver).

O'Brien v. Boston, etc., Ry. Co., 138 Mass. 387.

Gilman v. Eastern R. Corp., 10 Allen 233.

Seaver v. Boston, etc., Ry. Co., 14 Gray 466.

Gillshannon v. Stony Brook Ry. Corp., 10 Cush. 228.

Vick v. New York Cent., etc., Ry. Co., 95 N. Y. 267.

Russell v. Hudson River Ry. Co., 17 N. Y. 134.

McLaughlin v. Interurban Street Ry. Co., 91 N. Y. Supp. 883 (street car conductor riding on car during suspension of temporary duty, due to illness).

Manville v. Cleveland, etc., Ry. Co., 11 Ohio State, 417.

Sanderson v. Panther Lumber Co., 50 W. Va. 42; 40 S. E. 368.

Martin v. Atcheson, etc., Ry. Co., 166 U. S. 399; 41 Law Ed. 1051.

Louisville, etc., Ry. Co. v. Stuber, 108 Fed. 934.

In addition to these the following authorities are cited in the case of Dayton Coal & Iron Co. v. Dodd, 188 Fed. at pages 602 and 603, in support of the doctrine announced.

Kilduff v. Boston Elevated Ry. Co., 195 Mass. 307; 81 N. E. 191.

Bowles v. Ind. Ry. Co., 27 Ind. App. 672; 62 N. E. 94.

Ionnone v. New York & N. H. H. Ry. Co., 21 R. I. 432; 44 Atl. 592.

Saulese v. Lehigh Valley Ry. Co., 75 N. J. Law 798, 900; 69 Atl. 166.

Wright v. Ry. Co., 122 N. C. 852; 29 S. E. 100.

Roland v. Fift, 131 Ga. 683; 63 S. E. 133.

Tunney v. Midland Ry. Co., L. R. 1 C. P. 291.

Crenene v. Guest, etc., Ltd., L. R. 1 K. B., Div. 469.

Garre v. Colliery Ry. Co., L. R. 2 K. B., Div. 539.

Birmingham Ry. etc., Co. v. Sawyer, 156 Atl. 199; 47 S. 67.

We have examined the authorities above cited, with the exception of the English cases, and in our opinion they fully sustain the text quoted from Cyc., and we can not understand how any different legal principle can be involved in a case where a man is walking to his work and a case where a man is riding to his work.

In their brief presented to the court below counsel cited the case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, and say it is affirmed in 66 C. C. A. 345., 133 Fed. 471, and quotes the syllabus and a portion of the opinion.

In their brief in this court they use the following language:

"The case of Dishon v. Cincinnati, N. O. & T. Ry. Co., 126 Fed. 194, is not in point, and the case was affirmed in 133 Fed. 471, 66 C. C. A. 345, on the ground of contributory negligence, but the court intimated that in view of the case of Ellsworth v. Metheny, 104 Fed. 119, 44 C. C. A. 485, the holding of the lower court that decedent was still in the course of his employment (and, therefore, a fellow servant of those who killed him) was erroneous."

We submit that the Circuit Court of Appeals held nothing of the kind, and to sustain our contention we quote what the court said:

"The opinion of the court below upon this point of law is a well considered one, containing an in-

teresting review of the cases. In view, however, of the opinion of this court, in the case of Ellsworth v. Metheny, 104 Fed. 119, in which we held that a coal miner, who, during the noon hour, while not engaged in work, goes to a different part of the mine for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon his employer the duty of a master, to see that the entries through which he passes from and to the part of the mine where he is employed are kept in safe condition for passage, **we prefer to base our judgment sustaining the action of the court below upon the fact that, whatever the capacity in which the deceased was crossing the track—whether as a private individual or as an employe, exercising a privilege as such**—and whether the railroad company was or was not guilty of negligence in closing the opening between the cars without warning the deceased by bell or whistle of the engine of what he mght expect, the testimony makes out a plain case of contributory negligence on the part of the deceased."

The position of counsel for plaintiff in error is not consistent with the position they took in the lower court. If they are now contending that the relation of fellow servants did not exist between the deceased and the operatives of the train by which he was killed, that contention can not be sustained in view of the cases heretofore cited.

One hardly knows how to characterize the serene self-assurance of counsel when they say, "From

what has been said we think the antinomies of the court's decision have been made apparent."

The decision contains no antinomies, and if any appear to counsel it is due to their lack of comprehension. They seem to be unable to understand how the decedent could have been in the **employ** of the defendant and still not have been **employed in interstate commerce.**

This brings us to the definition of the word **employed** as it was meant by Congress, and as Congress intended it should be understood when it used the word in the Employers' Liability Act. The manner in which counsel have attempted to apply the word shows their lack of comprehension of its meaning as used in the Act.

In Funk & Wagnalls Standard Dictionary the following is found as the definition of the word employ:

"Employ. To engage, have, or keep for or in service or duty; procure or retain the services of; set or keep at work; furnish work or occupation for; as, men are employed on the work; to employ an agent.

" 'That man's mind is apt to become small as a pin point who is **employed** all his life in making a pin point.' McCosh Emotions, Bk. 1, Ch. 1, p. 20, s. 80.

"2. To make use of instrumentally; as, to employ money in trade; to employ alcohol as a solvent; to devote to a certain occupation; apply; occupy, as to employ one's energy in study; to employ one's time in writing. 4. To enclose; enfold.

"Synonyms: hire, use. What is **used** is viewed

as more absolutely an instrument than what is **employed.** A merchant **employs** a clerk; he uses pen and paper; as a rule, **use** is not said of persons, except in a degrading sense, as, the conspirators **used** him as a go-between. That which is **used** is openly consumed in the using, or in familiar phrase, **used up;** as, we **used** twenty tons of coal last winter; in such cases we could not substitute **employ.** A person may be **employed** in his own work or in that of another; in the later case the service is always understood to be for pay. In this connection **employ** is a word of more dignity than **hire.** A general is employed in his country's service; a mercenary adventurer is **hired** to fight tyrant's battles.

Prepositions: Employ, **in, on, upon,** or about a work, business, etc.; **for** a purpose."

Counsel again show their misconception of the meaning of the word as used in the Act when they say, on page 7 of their brief, as follows:

"Therefore, what Congress meant by the words 'shall be liable for any damages to any person suffering injury by such carrier in such commerce' was that the carrier should be liable to every person suffering injury while such person was used by the carrier, while he was in the employ of the carrier; when he was made use of by the carrier; while he was performing some duty which had been required of him by such carrier, so long as the things done by the employe were in aid of, or incidental to, or necessary, expedient, or desirable in carrying on the interstate business of such carrier."

It is never proper to say that persons are **used** or **made use of,** except in a degrading sense. Persons are **employed;** instrumentalities are **used** or **made use of.**

Safety Appliance Act.

On this point we take occasion to show the inapplicability of the decisions interpreting the Safety Appliance Act to the facts in this case. It would seem that no argument was necessary to show that these decisions can be of no possible assistance in solving the question involved in this case. Counsel have cited the case of Johnson v. Southern Pacific Ry. Co., 96 U. S. 1, 49 Law Ed. 363, a case where a brakeman was injured while attempting to couple an engine to a dining car which was standing in a side track, and have quoted quite extensively from the opinion.

This car was an **instrument** of interstate commerce, and it is quite proper to say that it was **used** in such commerce.

Counsel for defendant in that case made the error which counsel for plaintiff in error in this case have pointed out when they urged that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually **engaged** in interstate commerce, or being put into a train for such use. This car could not be **engaged** in interstate commerce any more than the employe could.

The court clearly points out the distinction be-

tween an instrument used in moving interstate commerce and interstate commerce itself.

It would be absurd to say that the Safety Appliance Act did not extend and apply to an instrument of interstate commerce, even though the instrument at the time in question was not **used** in such commerce.

We have never contended for any such a rule, and have no dispute with counsel for plaintiff in error that a railroad company would be liable for an injury to an employe caused by its failure to comply with the Safety Appliance Act, although the instrument of interstate commerce about which the employe was working, was not, at the time of the injury, actually being **used** in interstate commerce, but the decisions interpreting that act, and its application to the relation of master and servant, throw no light upon the question involved in this case, because liability is sought to be predicated against the raiload company in this case under an act of an entirely different character.

Employment in Interstate Commerce.

We will now take up the question as to whether or not Lamphere was **employed** in interstate commerce at the time he sustained the injury which resulted in his death. Accepting the statement of counsel for plaintiff in error as true, that "the employe not only does not **engage** in interstate commerce, but, as an employe, it is impossible for him to **engage** in it by railroad or otherwise," we are

somewhat surprised to find them quoting so extensively from the opinion in the case of Colasurdo v. Central Ry. Co. of New Jersey, 180 Fed. 832.

They italicize a portion of the opinion as follows:

"I think it should therefore be construed as intending to include within the term 'person employed in such commerce' all those persons who could be so included within the constitutional power of Congress; that is to say, the Act meant to include everybody whom Congress could include."

This begs the question and is reasoning in a circle. The only persons whom Congress could include within the act were persons employed in interstate commerce, because Congress had no power to legislate as to anyone else.

To say that Congress could only include within the act those persons who are employed in interstate commerce, and then say that only those persons who are employed in interstate commerce are included within the act, is reasoning in a circle, and in no manner assists in determining what persons are employed in interstate commerce.

Keeping in mind the statement of counsel for plaintiff in error that the employe does not **engage** in interstate commerce, but, as an employe, it is impossible for him to **engage** in it, we are still more surprised to find counsel quoting from the opinion of the court as follows:

"I am therefore of the opinion that the plaintiff was at the time engaged in interstate commerce, and entitled to the rights secured by this act. That

being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not. It is true that the act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employes. In short, if the employe was **engaged** in such commerce, so was the road, for the road was the master, and the servant's act its act."

Colasurdo, at the time of his injury, was employed in repairing a switch, and was struck by a train which was used between points within the State of New Jersey.

If it was impossible for the employe to have been **engaged** in interstate commerce (and we agree that it was), how could it be possible for the railroad company to have been **engaged** in interstate commerce by any act of the employe? The statement is the apogee of absurdity.

It is true that in the case of Zikos v. Oregon Railroad & Navigation Company, 179 Fed. 893, Judge Whitson held that a section man who was employed in repairing a track was within the provisions of the Employer's Liability Act. The question was brought up in that case also on a demurrer to the complaint.

But in the case of Tsmura v. Great Northern Ry. Co., reported in 108 Pac. at page 774, the Superme Court of Washington held that a man was not employed in interstate commerce who was employed by a railroad company at an agreed wage or hire, in the capacity of a common laborer in the

State of Montana, and who was, at the time of his injury, employed in the State of Washington, and was engaged in loading on a flat car a number of rails, and he while engaged in raising one of the rails from the ground and placing it on the car, certain of his co-employes, suddenly, violently and without due care, threw their end of the rail on the car in such a manner as to injure the plaintiff.

The court said:

"The respondent's theory seems to be that because the appellant was authorized to, and did at times, engage in interstate commerce, and because respondent was employed in loading a flat car with rails, which had been used, or were to be used, in the repair of its roadbed, in the State of Montana, he was necessarily engaged in interstate commerce within the meaning of the act. We can not assume that every employe of appellant, by reason of his employment, is so engaged. Appellant may have thousands of employes whose duties do not partake of that character. If the act in question is constitutional, it is so because it applies only to servants engaged in interstate commerce. If it is broad enough to include this case in its provisions; it is, in our opinion, open to the same objections which rendered the earlier act unconstitutional."

We are not unmindful of the fact that the court subjected itself to the criticism urged by counsel for the plaintiff in error in this case when it used the word **engage** with reference to the employe, but we think the decision is sound. As well might it be said that a man who was employed in repairing a race

track or shoeing a race horse was employed in racing, as to say that a man who was employed in repairing an instrumentality of interstate commerce was employed therein.

Counsel say on page 16 of their brief that because the word **employed**, as used in the act, is in the passive voice, it renders the construction contended for by them ineluctable. The construction contended for by counsel is not only far from being ineluctable, but it contains within itself in own refutation.

Congress knew that railroad companies did not **engage** in interstate commerce, except as they were **engaged** in the **transportation of** commerce from one state into another, and Congress also knew that the employes of railroad companies could not be **employed** in interstate commerce unless they were employed in the movement of such commerce.

We quote the language of Mr. Justice White in the case of Howard v. Illinois Cent. R. Co., 207 U. S. at page 498, in support of the proposition that the employe must be actually employed in the **movement** of interstate commerce in order to come within the provisions of this act. The language is as follows:

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers or their employes may be engaged at the time of the injury, of necessity includes subjects wholly outside of the

power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce **as to matters wholly independent of interstate commerce,** a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. **Take a railroad engaged in interstate commerce having a purely local branch operating wholly within a state.** Take again the same road **having shops for repairs, and, it may, be for construction work,** as well as a large **accounting** and **clerical force,** and having, it may be, **storage elevators, warehouses,** not to suggest, besides, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and **local** messages. Take an express company engaged in **local** as well as interstate business. Take a trolley line, moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line."

"**As the act includes many subjects wholly beyond the power to regulate commerce,** and depends for its sanction upon that authority, it results that the act is repugnant to the constitution." (The black face is ours.)

In view of the portion of the opinion of the learned chief justice just quoted we wonder at counsel's temerity in making the contention they do on pages 13, 14, 15 and 16 of their brief. The former act was declared unconstitutional because it imposed a liability upon the carriers in favor of any of their employes, **without qualifications or restriction as to the business in which the carriers or their employes might be engaged at the time of the injury.**

It seems to be the contention of counsel for plaintiff in error that the men who are employed in the shops of a railroad company where its engines are repaired, and upon its tracks and roadbed, and in and about its warehouses, etc., are employed in interstate commerce, although Mr. Chief Justice White specifically says they are not.

While we contend that the act applies only to train crews, we do not concede that it applies to all train crews. We contend that the act applies only to the employes of railroad companies who are employed in the movement of interstate commerce.

If the peculiar hazards which are connected with the movement of railroad trains, and the dangers incurred by the operatives of such trains were not in the mind of Congress at the time it passed the act, why did Congress confine its application to common carriers by railroad? It is because the movement of railroad trains is attended by peculiar hazards that this act can be sustained; otherwise it would be unconstitutional as class legislation,

as it only applies to common carriers by railroad, and does not apply to other persons engaged in interstate commerce.

We have said that we do not concede that the members of all train crews come within the provisions of the act, even though they cross a state line in running from one division point to another. We do not see how it is possible to bring within the provisions of the act members of the crew of a train which is used exclusively in carrying the mail, because while carrying the mail the railroad company is not a common carrier, but is an agent of the government, exercising a governmental function.

In 31 Cyc. 999 appears the following:

"A railroad company carrying the United States mails, whether under contract or by virtue of the requirements of the constitution and laws, is not, in respect to such service, a common carrier, but is a public agent of the United States employed in performing a governmental function."

In support of this there is cited:

Central R., etc., Co. v. Lampley, 76 Ala. 357; 52 Am. Rep. 334.

Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423; 92 N. W. 88.

Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed. 434; 54 C. C. A. 608.

An examination of the above cases will show that they support the text.

In 6 Cyc., page 375, it is said:

"No person is a common carrier in the sense of the law who performs the service without hire."

In support of this there is cited:

Choteau v. South Carolina R. Co., 16 Mo. 216.

Citizens Bank v. Nantucket Steam Boat Company, 2 Story 16; 5 Fed. Cases No. 2730.

In the case last cited Mr. Justice Story says:

"In the next place, I take it to be exceedingly clear that no person is a common carrier in the sense of the law who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier in all our books fully establishes this result."

This being so, a railroad company is not a common carrier while hauling gravel from its own pit in one state into another state to be used as ballast for its own track; nor would it be a common carrier while operating a construction or wrecking train, and the crews of such trains would not come within the provisions of the act, and we do not see how it can be claimed that a railroad was **engaging in interstate commerce** while operating its own trains exclusively in its own business and carrying nothing but its own property. If a member of this court owned a building in California and should come into Oregon to secure material to repair the same, we imagine it would require something more than the statement of counsel for plaintiff in error

to convince him that he was **engaging in interstate commerce** while hauling a load of his own lumber from Oregon into California in his own vehicle to repair his own building.

It is a known fact that when the President of the United States makes his "swing around the circle" the railroad companies over whose lines he travels, in their zeal to see that no accident happens to his train, send out in advance of it another train which is known in railroad parlance as a "way car bounce," which is composed of an engine and a way car. We do not think that the members of the crew of this train come within the provisions of the act, because while operating this train the railroad company would not be **engaging in interstate commerce**, nor would the members of the crew be employed therein.

In the case of Pederson v. Delaware L. & W. R. R. Co., 184 Fed. 737, the plaintiff was in the employ of the defendant and was employed to assist in the building of a track. Part of the track was to be laid upon a bridge, and plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The new track when finished was intended for use both in local business and in commerce between the states, but the train by which the injury was inflicted was a purely local train running between two points in the State of New Jersey.

In his opinion Judge McPherson says:

"First, the offending carrier must at the time

of the injury be engaging in commerce between any of the several states, etc., and second, the injury must be suffered by the employe while he is employed by such carrier in such commerce. Both these facts must be present or the act does not apply—the carrier must be actually engaging in interstate commerce and the employe must also be taking part therein. If, therefore, the business being done by the carrier is purely intrastate, and in the course of such business it injures an employe, the act does not apply. Neither does it apply, although the business being done by the carrier is commerce between the states, if the injured employe is engaged in work that does not properly belong to such commerce."

On page thirteen of their brief counsel took exception to the statement of the court that decedent was not employed in interstate commerce. Indeed, "not employed in commerce of any kind." This statement is absolutely true. Decedent was in the employ of the defendants, but he was not employed in commerce of any kind. Counsel would have us believe that the decedent would have been employed in interstate commerce if he had been standing on the depot platform waiting for the train which he was to board.

Counsel ask why Congress did not include within the provisions of the act the vast army of men whose efforts are just as necessary to the carrying on of interstate business as are the activities of train crews. Our answer is that Congress

does not possess the power to legislate as to any of the employes of the defendant except those who are employed in interstate commerce, maugre the fact that their efforts are just as necessary to the carrying on of interstate commerce as are the activities of those who are employed therein.

Further as to the Safety Appliance Act:

The construction applied to the Safety Appliance Act, upholding the power of Congress to require common carriers engaged in interstate commerce to equip the cars used in such service with safety appliances, does not imply that Congress may regulate the relations of master and servant engaged and employed in such commerce, for the reason that the Safety Appliance Act is alone addressed to the use of an instrument of interstate commerce, and upon that ground such legislation has been sustained. The Employers' Liability Act is applicable only to individuals or corporations employed or engaging in interstate commerce by railroad, and the reference to the title of the two acts points out the distinction above made.

Safety Appliance Act:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel brakes, and for other purposes."

Employers' Liability Act:

"An act relating to the liability of common carriers by railroad to their employes in certain cases."

In the Safety Appliance Act the subject directly treated is the promotion of the safety of the employes and travelers by compelling the common carrier to equip their cars with safety appliances, while in the other act the subject directly treated is that of the liability of the master to his servant.

There is a marked distinction between interstate commerce and the instrumentalities thereof, on one side, and the mere incidents which may attend the carrying on of such commerce, on the other.

Mr. Justice White in the Hooper case, 155 U. S. 648, observes on page 655 in referring to the distinction above stated:

"This distinction has always been carefully observed and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

In the case of Adair v. United States, 208 U. S. 161, the very essence of the decision is that a regulation of employer and employes may in certain

cases be permissible if it is a regulation of commerce, but that it must be shown to be a regulation of interstate commerce before it can be sustained, and it must bear some apparent logical relation to the **flow** of commerce in order to be sustained.

It is clear that the Safety Appliance Act applies to instrumentalities of interstate commerce, whether they are being used in interstate commerce or not, but the Employers' Liability Act only applies to persons who are actually employed in interstate commerce.

The confusion of the two acts by counsel for plaintiff in error is due to their attempt to use the words **employed** and **used** interchangeably, and to their inability to comprehend that it was possible for the decedent to have been in the employ of the defendants in error and still not have been employed in interstate commerce.

On page 20 of their brief counsel for plaintiff in error says:

"If it was the purpose of Congress to protect solely persons subject to the hazards peculiar to train operation, why did it not say 'or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, track or roadbed?'"

Our answer to this question is that Congress did say this. Counsel for plaintiff in error seems to be unable to understand what Congress did say. Congress said:

"That every common carrier by railroad while engaging in commerce between any of the several

states or territories, or between any of the states or territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia and any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employe, to his or her personal representative * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Thus it will be seen that a common carrier by railroad engaging in interstate commerce is liable for the injury or death of any of its employes, while employed in interstate commerce, due to the negligence of other employes, and also the common carrier by railroad, while engaging in interstate commerce, is liable for the injury or death of any of its employes employed in such commerce, caused by any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment due to its negligence. So it is clear that a common carrier by railroad engaging in interstate commerce would not be liable to such employe for any injury caused by a defect in its roadbed or equipment due to the negligence of fellow servants, and that the defenses of contributory negligence and assumption of risk in such

cases would be available to the carrier; but if the injury was caused by any defect in its roadbed or equipment due to the negligence of a vice principal, these defenses would not be available to the carrier. This is the reason that Congress put into the act the provision that the common carrier should be liable to the servant for injuries caused by reason of the defects in its roadbed and equipment due to its negligence. Heretofore no recovery could be had by a servant against the master for injuries caused by defective machinery, if the defect was open and obvious, unless there had been a promise to repair by the master. If the defect or insufficiency of its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment is due to the negligence of a fellow servant and not the negligence of a vice principal, the defense of assumption of risk and contributory negligence may be pleaded as a defense to an action for such injuries, and the character of the act determines whether or not a man is a vice principal or fellow servant.

The case of United States v. Morris, 29 U. S. 464, 475, 10 Law Ed. 543, is not relevant to the question we are now considering. We will concede that a railroad company would be engaging in interstate commerce when it started one of its trains loaded with interstate commerce, although the train had not gone beyond the territorial limits of the state in which the shipment started, and we will also concede that the members of that train crew would be employed in interstate commerce, but we

cannot see how it may be said that any member of that crew would be employed in interstate commerce while he was walking from his home to the place where the train was standing preparatory to starting on its trip into another state.

Nor do we see how it is possible to bring within the provision of the act members of the crews of trains, the cars of which are loaded with interstate commerce, where the railroad on which the cars are being moved is operated wholly within the territorial limits of a state, or the members of train crews of trains running between division points wholly within the territorial limits of a state, because Mr. Chief Justice White says "That a railroad company engaging in interstate commerce, **when operating a purely local branch, wholly within a state,** is not engaging in interstate commerce," and if the railroad company is not engaging in interstate commerce when operating a branch line wholly within the state, the members of the crews of the trains operated on such branch line are not employed in interstate commerce, even though some of the cars of the trains are loaded with commodities which come from other states.

Nor can we see how it may be said that the members of a switching crew employed by a carrier engaging in interstate commerce are employed in such commerce while switching a car loaded with interstate commodities.

The statement that the decedent at the time of his death was not engaged in anything is true. It is true that he was in the **employ** of the defendants,

but he was not **employed** in interstate commerce. Would he have been engaged in anything or employed in anything if he had passed safely through this opening between the cars and was standing on the platform of the depot waiting for the train? We do not see how it is possible to say that decedent would have been employed in interstate commerce if he had been standing on the platform of the depot waiting for his train, although he would have been nearer to his destination than he was at the time he was injured.

On page 51 of their brief counsel say:

"But says the court below, Lamphere was killed through the negligence of fellow servants. How, we ask, can a person be a fellow servant of the persons injuring him unless he himself, at the time of the injury, is performing a fellow service, something contemplated by his contract of employment?"

How, we ask, have counsel the temerity to ask such questions as these when they themselves, in their brief presented to the lower court, contended that decedent and the members of the train crew, whose negligence it is alleged caused the injury, were fellow servants, and cited authorities to support the proposition?

We do not know how to characterize the conduct of counsel when they make the following statement on page 52 of their brief: "But here we have the anomalous condition of a court's declaring that decedent was a fellow servant and not a fellow servant; that decedent when killed was in the line of his duty and not in the line of his duty; that

he was working for the company and not working for the company; that he was being used in interstate commerce and not being used in interstate commerce; that he was engaged in doing something and not engaged in doing anything."

Counsel were forced to concede the law to be that decedent and the members of the train crew causing the injury were fellow servants, and the court said that while decedent was walking from his home to the depot he was not **employed** in interstate commerce.

Counsel for plaintiff in error seem to be unable to comprehend how it is possible for the relation of fellow servants to exist among all the employes of a common master although some of the employes may not be actually employed in any particular line of work.

We wish the court to keep in mind that the Employers' Liability Act applies only to common carriers by railroad engaging in interstate commerce, and that section 3 provides that in an action brought by an employe under or by virtue of any of the provisions of this act the employe's contributory negligence may be considered by the jury and the damages diminished in proportion to the amount of negligence attributable to such employe, and then provides "that no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of **any statute enacted for the safety of employes contributed** to the injury or death of an employe."

Section 4 of the act provides:

"That in any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employes, such employes shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of **any statute enacted for the safety of employes** contributed to the injury or death of such employe."

Counsel cite the case of Barrett v. City of New York et al., 189 Fed. 68, which holds that where express companies took packages of merchandise coming from other states at railroad or steamer terminals and transported them by wagons through the streets and avenues of New York to the consignee, such business was a part of interstate commerce, and not subject to city ordinances licensing the business of expressmen within the city. The relevancy of this case is not apparent.

To show the confusion which exists in the minds of counsel for plaintiff in error we quote from page 21 of their brief as follows:

"Now, it is a well known fact that many railroads, like the Northern Pacific Railway Company, instead of hauling cars for other express companies, conduct, as a part of their business, an express department. Certainly a driver of an express wagon if injured through the negligence 'of any of the officers, agents or employes of such carrier or by reason of any defect or insufficiency due to its negligence in its cars * * * appliances,

machinery * * * or other equipment' (which would include his express wagon and harness, or a motor driven carriage, if used), if such an expressman should be injured while in the performance of his duty he certainly would be 'employed by such carrier in such commerce,' and he would not be injured in the operation of any train, nor would his employment subject him to hazards peculiar to train service."

We will concede for the purposes of this argument that a driver of an express wagon would be **employed** in interstate commerce, but he would not come within the provisions of the Employers' Liability Act because he would not be employed in interstate commerce by **railroad,** and the express company would not be engaging in interstate commerce by **railroad** while it was engaging in interstate commerce by **wagon.** No doubt the express company would be engaging in interstate commerce, as was held in the case of Barrett v. City of New York (supra), but the Employers' Liability Act only applies to common carriers by **railroad** engaging in interstate commerce.

If it were not for the special hazard connected with the operation of railroad trains, this act would have to be declared unconstitutional as being class legislation, inasmuch as it only applies to common carriers by railroad engaging in interstate commerce, and it is because of the peculiar hazards connected with the operation of trains that the act can be sustained and justifies the classification of common carriers by railroad.

Congress permitted the defense of contributory negligence to be interposed in actions brought under or by virtue of the provisions of the Employers' Liability Act, but declared that this defense should not be a bar to the action but should be considered in fixing the amount of damages or in diminution of the amount claimed. Congress absolutely prohibited the interposition of the defense of contributory negligence in an action brought under or by virtue of any of the provisions of the Employers' Liability Act where the violation by the common carrier of **any statute enacted for the safety of employes** contributed to the injury or death of such employe.

By Section 4 Congress barred the defense of assumption of risk to an action brought under or by virtue of any of the provisions of this act where the violation by such common carrier of any **statute enacted for the safety of employes** contributed to the injury or death of such employe.

Now then, is it not clear that Congress, by the enactment of the Employers' Liability Act, created a cause of action in favor of the personal representatives for the damages sustained on account of the death of a person caused by the negligent act of another, which cause of action did not exist at common law?

At common law the employe of a railroad company had a cause of action against the railroad company for injuries sustained through the failure of the railroad company to comply with its common law duty to exercise reasonable care to provide him

with a safe place in which to work and safe tools to work with, provided the employe was not guilty of contributory negligence. The representative of an employe killed by the negligence of the railroad company had no action at common law against the railroad company because the cause of action did not survive. By the Employers' Liability Act this cause of action survives to the personal representatives of the decedent when the death results "in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

Now this act must be so interpreted as to effectuate the object of Congress in passing it. The decisions interpreting state statutes abolishing the fellow servant rule as to employes of railroad companies are of no assistance in interpreting this act, because state legislatures possess all the powers of legislation except those which are prohibited by either the state or federal constitutions, while Congress possesses only the powers of legislation which are granted to it by the federal constitution.

This legislation being confined in its application to only one class of common carriers engaging in interstate commerce, there must be some reasonable basis for this classification; otherwise the act would be unconstitutional. It can be sustained upon no other basis than that of the peculiar hazard necessarily incident to the movement of railroad

trains. We are not permitted to speculate as to whether Congress might have legislated as to persons who do not come within the provisions of this act. This act was scrutinized and revised by some of the ablest lawyers in the country in the light of the opinion of the Supreme Court which declared the former act unconstitutional. These men knew that the only way railroad companies could engage in interstate commerce was by the transportation of articles of interstate commerce, and they knew that Congress had no power to pass any legislation affecting the relations of the employes with the railroad company except while the railroad was engaging in the transportation of interstate commerce and while the employe was employed in such transportation.

When the only possible way in which a railroad company can engage in interstate commerce is by transporting articles of interstate commerce, how can an employe of a railroad company be employed in interstate commerce unless he is employed in assisting in the transportation of articles of interstate commerce?

In the case of St. Louis I. M. & S. Ry. Co. v. Conley, 187 Fed. 949, the United States Circuit Court of Appeals for the Eighth Circuit says on page 952:

"The primary object of the act was to promote the safety of employes of railroads while actively engaged in the **movement** of interstate commerce. * * *"

We think this was not only the primary object but the only object of the act, and that Congress had no power to enact any statute affecting their relations with the railroad company unless they were thus employed.

We will close this brief with a quotation from the opinion of the court which we think is a correct statement of the law:

"For the purposes of this case I deem it sufficient to say that a locomotive fireman is not, while on the way from his home to the depot for the purpose of taking a train to a distant point as a part of a deadhead crew, there to fire an engine hauling an interstate train, employed in interstate commerce."

Respectfully submitted,

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